

No. 15271

United States
Court of Appeals
for the Ninth Circuit

See vol. 2984

OREGON PLYWOOD SALES CORPORATION,
Appellant,

vs.

SUTHERLIN PLYWOOD CORPORATION and
NORDIC PLYWOOD, INC., Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

JAN - 7 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland, Oregon,

For Appellees.

In the United States District Court
for the District of Oregon

No. Civ. 7754

OREGON PLYWOOD SALES CORPORATION,
a corporation, Plaintiff,

vs.

SUTHERLIN PLYWOOD CORPORATION, a
corporation, and NORDIC PLYWOOD, INC.,
a corporation, Defendants.

COMPLAINT

I.

Plaintiff is a corporation incorporated under the laws of the State of New York. Defendants are corporations incorporated under the laws of the State of Oregon. The matter in controversy, exclusive of interest and costs, exceeds \$3000.00.

II.

Plaintiff and defendant Sutherlin Plywood Corporation are parties to a contract whereby plaintiff was and is granted the first right and option to buy, at prices therein provided, 80% of defendant's total output of plywood upon terms and conditions therein set forth.

III.

Defendant Sutherlin Plywood Corporation has breached said contract by failing and refusing to grant plaintiff the first right and option therein provided and referred to above, and defendant has sold its mill to defendant Nordic Plywood, Inc.,

thereby wholly disabling itself from performing its obligations under said contract.

IV.

Defendant Sutherlin Plywood Corporation has breached said contract by selling part of its production to third persons at a price lower than the wholesale jobber's market price defined in said contract.

V.

Defendant Nordic Plywood, Inc. unlawfully interfered with said contract and induced a breach thereof and agreed and conspired with defendant Sutherlin Plywood Corporation to destroy plaintiff's rights therein.

VI.

Plaintiff has demanded that defendant Nordic Plywood, Inc. adhere to and perform said contract, and pursuant thereto has placed orders with defendant Nordic Plywood, Inc. to purchase plywood produced in said mill on the terms and conditions therein set forth. Said defendant has wholly refused and failed to fill said orders or any of them or otherwise to adhere to or perform said contract.

VII.

By reason of the matters alleged above, plaintiff has suffered damages in the amount of \$100,000.00, and if said acts continue there will be a multiplicity of suits, and plaintiff will suffer immeasurable and irreparable damage.

Wherefore, plaintiff prays for a Judgment and Decree as follows:

(a) Permanently enjoining defendant Nordic Plywood, Inc. from operating said mill except in compliance with the terms of the contract above referred to.

(b) Awarding plaintiff damages in the amount of \$100,000.00 against defendant Nordic Plywood, Inc. for interfering with said contract and inducing a breach thereof and conspiring and agreeing with defendant Sutherlin Plywood Corporation to destroy plaintiff's rights therein.

(c) Awarding plaintiff damages in the amount of \$100,000.00 against defendant Sutherlin Plywood Corporation for breach of contract.

(d) Awarding plaintiff punitive or exemplary damages against both defendants in the amount of \$50,000.00.

(e) Awarding plaintiff its costs and disbursements herein incurred.

(f) Awarding plaintiff such other and further relief as to the Court may seem equitable and just.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
/s/ JAMES C. DEZENDORF,
/s JAMES H. CLARKE,
Attorneys for Plaintiff

[Endorsed]: Filed November 4, 1954.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM OF DEFENDANT SUTHERLIN PLYWOOD CORPORATION

First Defense

Defendant Sutherlin Plywood Corporation pleads in abatement as follows:

I.

Plaintiff is and at all times since the institution of this action has been a corporation organized and existing under and by virtue of the laws of the state of New York.

II.

At the time of the commencement of this action and at all times since, plaintiff had not and has not now obtained certificate of authority from the Corporation Commissioner of the state of Oregon to transact business in the state of Oregon.

III.

By reason of plaintiff's failure to obtain such certificate of authority, plaintiff lacks the capacity to maintain any action, suit or proceeding in this court.

Second Defense

Comes now defendant Sutherlin Plywood Corporation, and for its answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I.

II.

Answering the allegations of paragraph II, defendant Sutherlin Plywood Corporation admits that plaintiff and defendant Sutherlin Plywood Corporation executed an instrument in which defendant Sutherlin Plywood Corporation purported to grant to plaintiff the right to purchase, at prices therein provided, 80 per cent of the total output of plywood of defendant Sutherlin Plywood Corporation upon terms and conditions therein set forth. Denies each and all the remaining allegations of paragraph II.

III.

Answering the allegations of paragraph III, defendant Sutherlin Plywood Corporation admits that it sold its plywood mill to defendant Nordic Plywood, Inc., and that after said sale defendant Sutherlin Plywood Corporation possessed no facilities for manufacturing plywood. Denies each and all the remaining allegations of paragraph III.

IV.

Denies each and all the allegations of paragraph IV.

V.

Denies each and all the allegations of paragraph V.

VI.

Answering the allegations of paragraph VI, defendant Sutherlin Plywood Corporation admits that plaintiff has demanded that defendant Nordic Plywood, Inc., sell plywood to plaintiff in accord-

ance with the purported grant contained in said instrument, and has placed orders with defendant Nordic Plywood, Inc., to purchase plywood produced in said mill purportedly on the terms and conditions set forth in said instrument, and that defendant Nordic Plywood, Inc., has wholly refused and failed to fill said orders, or any of them, or otherwise to sell plywood to plaintiff in accordance with said purported grant. Denies each and all the remaining allegations of paragraph VI.

VII.

Denies each and all the allegations of paragraph VII.

Third Defense

Defendant Sutherlin Plywood Corporation moves the court for an order striking from the prayer of the complaint the following:

“(d) Awarding plaintiff punitive or exemplary damages against both defendants in the amount of \$50,000.00.”

on the ground that the same is wholly irrelevant and not pertinent to the cause of suit undertaken to be alleged in said pleading.

Fourth Defense

I.

On or about December 17, 1953, plaintiff and defendant Sutherlin Plywood Corporation executed a certain instrument, a photostatic copy of which is attached hereto, marked Exhibit A, and by reference made a part hereof. Defendant Sutherlin

Plywood Corporation is informed and believes, and on information and belief alleges, that said instrument is the same as the alleged contract referred to in plaintiff's complaint herein.

II.

The purported grant by defendant Sutherlin Plywood Corporation to plaintiff of a right to purchase 80 per cent of the total output of defendant Sutherlin Plywood Corporation contained in said instrument was made without consideration.

Fifth Defense

I.

The alleged contract referred to in plaintiff's complaint and by which defendant Sutherlin Plywood Corporation is sought to be charged was and is by its terms not to be performed within a year from the making thereof. Neither said alleged contract, nor any note or memorandum thereof, expresses any consideration.

II.

Said alleged contract is void under the statutes of frauds, ORS 41.580.

Sixth Defense

I.

At all times herein mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the state of New York. At all times herein mentioned Oregon Plywood Cor-

poration was and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon. Defendant Sutherlin Plywood Corporation is informed and believes, and on information and belief alleges, that plaintiff is a subsidiary corporation owned or controlled by Oregon Plywood Corporation.

II.

At all times herein mentioned defendant Sutherlin Plywood Corporation was and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon.

III.

On or about December 17, 1953, defendant Sutherlin Plywood Corporation made, executed and delivered its promissory note to Oregon Plywood Corporation for the sum of \$50,000, with interest thereon payable at the rate of 4 per cent per annum from date until paid.

IV.

On or about December 17, 1953, defendant Sutherlin Plywood Corporation made, executed and delivered to Oregon Plywood Corporation its mortgage of real and personal property to secure the payment of said \$50,000 in accordance with the terms of said promissory note.

V.

On or about December 17, 1953, defendant Sutherlin Plywood Corporation and plaintiff executed Exhibit A. Exhibit A designates defendant Suther-

lin Plywood Corporation as party of the first part and plaintiff as party of the second part and provides in part as follows:

“Party of the First Part agrees as compensation for services by Party of the Second Part that an additional 5% of the Mill Value of product shall be retained by Party of the Second Part.”

VI.

If Exhibit A constituted a contract as alleged in plaintiff's complaint, it was executed in return for a loan of \$50,000 as evidenced by said note. Said interest of 4 per cent on said note and said compensation of 5 per cent of the mill value of products shipped constituted a greater sum or value for the loan or use of money than that prescribed by ORS 82.010.

Counterclaim

I.

At all times herein mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the state of New York.

II.

At all times herein mentioned defendant Sutherlin Plywood Corporation was and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon.

III.

As a result of the transactions between plaintiff and defendant Sutherlin Plywood Corporation aris-

ing out of the alleged contract referred to in plaintiff's complaint, defendant Sutherlin Plywood Corporation overpaid plaintiff by the sum of \$6,205.94.

Wherefore, defendant Sutherlin Plywood Corporation prays that all proceedings in the above entitled action be abated. If said action is not abated, defendant Sutherlin Plywood Corporation prays that:

(1) Prior to the trial of this cause the court determine whether plaintiff is entitled to assert a claim for punitive or exemplary damages.

(2) Plaintiff's complaint be dismissed.

(3) Defendant Sutherlin Plywood Corporation have judgment against plaintiff for the sum of \$6,205.94.

(4) Defendant Sutherlin Plywood Corporation have and recover from plaintiff its costs and disbursements herein incurred.

(5) Defendant Sutherlin Plywood Corporation have such other relief as to the court may seem just and equitable.

/s/ GEORGE A. LUOMA,

Attorney for Defendant Sutherlin Plywood Corporation

EXHIBIT A

This contract made and entered into this 17th day of December, 1953, by and between Sutherlin Plywood Corporation, Party of the First Part, and Oregon Plywood Sales Corporation, Party of the Second Part;

Witnesseth:

In consideration of the benefits to be derived by each party hereto, Party of the First Part gives and grants unto Party of the Second Part the right to purchase up to 80% of the output of Party of the First Part when Party of the First Part gets into production, and Party of the First Part agrees to accept up to 80% and ship Party of the Second Part's orders as specified and within a reasonable time.

It is further agreed should Party of the First Part not sell the remaining 20% of its product in the ordinary course of business, Party of the Second Part shall have the right to purchase said 20% or part thereof not sold as aforesaid.

It is agreed that the price to be paid for the products of Party of the First Part shall be the wholesale jobber's market price from time to time. If for any reason the parties hereto cannot agree as to this price at any given time, then the price shall be determined by taking the average wholesale jobber's price as evidenced by: 1. Invoices; 2. Quotations; 3. Price lists; of the following ten mills:

Associated Plywood Co.

Anacortes Veneer, Inc.

Georgia-Pacific Plywood Co.

Vancouver Plywood Co.

M & M Woodworking Co.

Northwest Door Co.

Evans Products Co.

Columbia Veneer Co.

Clear Fir Sales Co.

Oregon-Washington Plywood Co.

Party of the Second Part covenants to advance to Party of the First Part 80% of mill value on each car promptly upon receipt of invoice and original bill of lading, balance within ten days after arrival of car at destination, all less 2% cash discount. Value of veneer paid for by Party of the Second Part in each car to be deducted from the payment.

Party of the First Part agrees as compensation for services by Party of the Second Part that an additional 5% of the Mill Value of product shall be retained by Party of the Second Part.

Party of the First Part covenants that it will not sell any of its product to other or others at a price lower than the above mentioned wholesale or jobber's price.

Party of the Second Part covenants to use its best effort to maintain with Party of the First Part a thirty days' order file at the Mill.

It is agreed that there is a mortgage on the mill property of the Party of the First Part to Oregon Plywood Corporation, with certain monthly and annual payments to be made, but in the event Party of the Second Part shall not, at any time or times during the term of said mortgage, furnish sufficient orders to Party of the First Part which would enable Party of the First Part to dispose of 80% of the product of said mill, and for such reason said mill does not operate, then during such period or periods the payments stipulated to be made on said

mortgage shall be deferred until Party of the Second Part shall have furnished Party of the First Part orders which shall enable Party of the First Part to operate its mill continuously for the period of at least two weeks, whereupon the regular payments on the mortgage indebtedness shall resume, and the term of said mortgage shall be extended accordingly.

Party of the First Part shall have the right to reject any orders placed with it by Party of the Second Part, provided specifications are not up to production conditions, nor if unprofitable. All orders shall be deemed accepted unless same shall have been rejected and notices of rejection received by Party of the Second Part within forty-eight (48) hours from receipt of order by Party of the First Part.

It is further agreed that any specification not covered by price procedure above mentioned shall be submitted to Party of the First Part for special price or its approval prior to acceptance of order.

It is further agreed that all plywood shall be manufactured, loaded and shipped in accordance with the Douglas Fir Plywood Association standards and the grade marked thereon, and that the shipping weights will not exceed the following weights per thousand surface feet: $\frac{1}{4}$ " 790 pounds; $\frac{5}{16}$ " 950 pounds; $\frac{3}{8}$ " 1125 pounds; $\frac{1}{2}$ " 1525 pounds; $\frac{5}{8}$ " 1825 pounds; $\frac{3}{4}$ " 2225 pounds.

This sales contract shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50

months [but this agreement shall be extended one month for each \$3,000.00 advanced over said \$50,000.00. Initialed: R. F. H., M. Wood.]* but under no circumstances shall expire until the mortgage by Party of the First Part to Oregon Plywood Corporation shall be paid in full.

It is understood and agreed that if the Party of the First Part is unable to produce because of fire, earthquake, disaster or act of God, this contract shall continue in full force until the mortgage heretofore mentioned is paid in full.

It is further agreed that Party of the Second Part shall acquire one share of stock in Party of the First Part, and Party of the First Part shall keep a representative of Party of the Second Part upon its Board of Directors until the mortgage given by Party of the First Part to Oregon Plywood Corporation shall be paid in full, at which time said share of stock shall be surrendered to Party of the First Part upon Party of the Second Part being paid the original purchase price therefor.

In witness whereof, this agreement has been signed in duplicate by the duly authorized officers of each corporation, and the seal of each such corporation is attached hereto, the date first hereinabove written.

SUTHERLIN PLYWOOD CORPORATION, a corporation,

/s/ By MILLARD WOOD,
President

*Handwritten.

OREGON PLYWOOD SALES CORPORATION, a corporation,

/s/ By ROBERT F. HOFHEINS
Secretary-Treasurer

Service of Copy Acknowledged.

[Endorsed]: Filed December 13, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT NORDIC
PLYWOOD, INC.

First Defense

Defendant Nordic Plywood, Inc., pleads in abatement as follows:

I.

Plaintiff is and at all times since the institution of this action has been a corporation organized and existing under and by virtue of the laws of the state of New York.

II.

At the time of the commencement of this action and at all times since, plaintiff had not and has not now obtained certificate of authority from the Corporation Commissioner of the state of Oregon to transact business in the state of Oregon.

III.

By reason of plaintiff's failure to obtain such certificate of authority, plaintiff lacks the capacity to maintain any action, suit or proceeding in this court.

Second Defense

Comes now defendant Nordic Plywood, Inc., and for its answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I.

II.

Answering the allegations of paragraph II, defendant Nordic Plywood, Inc., admits that plaintiff and defendant Sutherlin Plywood Corporation executed an instrument in which defendant Sutherlin Plywood Corporation purported to grant to plaintiff the right to purchase, at prices therein provided, 80 per cent of the total output of plywood of defendant Sutherlin Plywood Corporation upon terms and conditions therein set forth. Denies each and all the remaining allegations of paragraph II.

III.

Answering the allegations of paragraph III, defendant Nordic Plywood, Inc., admits that defendant Sutherlin Plywood Corporation sold its plywood mill to defendant Nordic Plywood, Inc., and that after said sale defendant Sutherlin Plywood Corporation possessed no facilities for manufacturing plywood. Denies each and all the remaining allegations of paragraph III.

IV.

Denies each and all the allegations of paragraph IV.

V.

Denies each and all the allegations of paragraph V.

VI.

Answering the allegations of paragraph VI, defendant Nordic Plywood, Inc., admits that plaintiff has demanded that defendant Nordic Plywood, Inc., sell plywood to plaintiff in accordance with the purported grant contained in said instrument, and has placed orders with defendant Nordic Plywood, Inc., to purchase plywood produced in said mill purportedly on the terms and conditions set forth in said instrument, and that defendant Nordic Plywood, Inc., has wholly refused and failed to fill said orders, or any of them, or otherwise to sell plywood to plaintiff in accordance with said purported grant. Denies each and all the remaining allegations of paragraph VI.

VII.

Denies each and all the allegations of paragraph VII.

Third Defense

Defendant Nordic Plywood, Inc., moves the court for an order striking from the prayer of the complaint the following:

“(d) Awarding plaintiff punitive or exemplary damages against both defendants in the amount of \$50,000.00.”

on the ground that the same is wholly irrelevant and not pertinent to the cause of suit undertaken to be alleged in said pleading.

Fourth Defense

I.

On or about December 17, 1953, plaintiff and defendant Sutherlin Plywood Corporation executed a certain instrument, a photostatic copy of which is attached hereto, marked Exhibit A, and by reference made a part hereof. Defendant Nordic Plywood, Inc., is informed and believes and on information and belief alleges that said instrument is the same as the alleged contract referred to in plaintiff's complaint herein.

II.

The purported grant by defendant Sutherlin Plywood Corporation to plaintiff of a right to purchase 80 per cent of the total output of defendant Sutherlin Plywood Corporation contained in said instrument was made without consideration.

Fifth Defense

I.

The alleged contract referred to in plaintiff's complaint and by which defendant Nordic Plywood, Inc., is sought to be charged was and is by its terms not to be performed within a year from the making thereof. Neither said alleged contract, nor any note or memorandum thereof, expresses any consideration.

II.

Said alleged contract is void under the statutes of frauds, ORS 41.580.

Sixth Defense

I.

Defendant Nordic Plywood, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Oregon.

II.

At all times herein mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the state of New York. At all times herein mentioned Oregon Plywood Corporation was and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon. Defendant Nordic Plywood, Inc., is informed and believes, and on information and belief alleges, that plaintiff is a subsidiary corporation owned or controlled by Oregon Plywood Corporation.

III.

At all times herein mentioned defendant Sutherlin Plywood Corporation was and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon.

IV.

On or about December 17, 1953, defendant Sutherlin Plywood Corporation made, executed and delivered its promissory note to Oregon Plywood Corporation for the sum of \$50,000, with interest thereon payable at the rate of 4 per cent per annum from date until paid.

V.

On or about December 17, 1953, defendant Sutherland Plywood Corporation made, executed and delivered to Oregon Plywood Corporation its mortgage of real and personal property to secure the payment of said \$50,000 in accordance with the terms of said promissory note.

VI.

On or about December 17, 1953, defendant Sutherland Plywood Corporation and plaintiff executed Exhibit A. Exhibit A designates defendant Sutherland Plywood Corporation as party of the first part and plaintiff as party of the second part and provides in part as follows:

“Party of the First Part agrees as compensation for services by Party of the Second Part that an additional 5% of the Mill Value of product shall be retained by Party of the Second Part.”

VII.

If Exhibit A constituted a contract as alleged in plaintiff's complaint, it was executed in return for a loan of \$50,000 as evidenced by said note. Said interest of 4 per cent on said note and said compensation of 5 per cent of the mill value of products shipped constituted a greater sum or value for the loan or use of money than that prescribed by ORS 82.010.

Seventh Defense

I.

Defendant Nordic Plywood, Inc., is a corporation

organized and existing under and by virtue of the laws of the state of Oregon.

II.

If defendant Nordic Plywood, Inc., interfered with the alleged contract referred to in plaintiff's complaint or induced a breach thereof as alleged in paragraph V of plaintiff's complaint, said interference and said breach were without malice and were privileged for the reason that defendant Nordic Plywood, Inc., had an economic interest in the subject matter of said alleged contract.

Wherefore, having fully answered the allegations of plaintiff's complaint, defendant Nordic Plywood, Inc., prays that all proceedings in the above entitled action be abated. If the action is not abated, defendant Nordic Plywood, Inc., prays that:

(1) Prior to the trial of this cause the court determine whether plaintiff is entitled to assert a claim for punitive or exemplary damages.

(2) The complaint herein be dismissed.

(3) Defendant Nordic Plywood, Inc., have and recover of and from plaintiff its costs and disbursements herein incurred.

(4) Defendant Nordic Plywood, Inc., have such other relief as to the court may seem just and equitable.

KING, MILLER, ANDERSON,
NASH & YERKE,
/s/ FREDRIC A. YERKE, JR.,
Attorneys for Defendant Nordic
Plywood, Inc.

[Note: Exhibit A is a duplicate of Exhibit A attached to Answer of Sutherlin Plywood Corp. set out at pages 12-17.]

Service of Copy Acknowledged.

[Endorsed]: Filed Dec. 13, 1954.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM OF DEFEND-
ANT SUTHERLIN PLYWOOD CORPORA-
TION

Plaintiff admits the allegations contained in Paragraph I and II of the counterclaim and denies each and every other allegation contained therein.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiff.

Service of Copy Acknowledged.

[Endorsed]: Filed Dec. 18, 1954.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above entitled action came on regularly for a pre-trial conference before the undersigned Judge of the above entitled court on the 27th day of February, 1956. Plaintiff appeared by Herbert H. Anderson, one of its attorneys. Defendant Sutherlin Plywood Corporation appeared by George Luoma, Fredric A. Yerke, Jr., and Mark C. Mc-

Clanahan of its attorneys and defendant Nordic Plywood, Inc., appeared by Fredric A. Yerke, Jr., and Mark C. McClanahan of its attorneys. During the course of the pre-trial conference the following facts were agreed upon:

Agreed Facts

I.

Plaintiff is a corporation incorporated under the laws of the State of New York and qualified to do business in Oregon. Defendants are corporations incorporated under the laws of the State of Oregon. The matter in controversy exclusive of interest and costs exceeds \$3,000.00

II.

Defendant Sutherlin was organized on November 1, 1951. During November 1951, said corporation purchased a plant site at Sutherlin, Douglas County, Oregon, upon which were situated certain buildings and facilities formerly used in the operation of a sawmill. These buildings and a new building thereafter constructed were used to house the machinery required for the operation of a "plywood lay-up mill." The last of the major items of equipment required for the operation of said mill was delivered during October, 1953. Said mill was not designed to manufacture green veneer, but to process green veneer into plywood.

III.

On or about December 17, 1953, plaintiff and de-

defendant Sutherlin Plywood Corporation executed the instrument which is plaintiff's Exhibit 1.

IV.

On or about December 17, 1953 defendant Sutherlin Plywood Corporation and Oregon Plywood Corporation entered into the agreement which is plaintiff's Exhibit 2 and defendant Sutherlin in accordance therewith executed and delivered to Oregon Plywood Corporation a note and mortgage, Exhibits 3 and 4.

V.

During the months of January, February and March, 1954 defendant Sutherlin Plywood Corporation honored plaintiff's orders and Oregon Plywood Corporation purchased the green veneer which was used by defendant Sutherlin in its operations.

VI.

In April, 1954 defendant Sutherlin Plywood Corporation ceased operating its plant. Defendant Sutherlin Plywood Corporation has not supplied plaintiff with any plywood since that date.

VII.

In July, 1954 defendant Sutherlin Plywood Corporation began negotiating for the sale of its mill. A special meeting of the board of directors of defendant Sutherlin was held on July 28, 1954 and was attended by the following directors:

Robert F. Hofheins, E. F. Cunningham, C. Millard Wood, C. A. Petherick, Gerald Egan, M. D. Steinbach, Leo Sunnell.

At said meeting the following resolution was adopted:

“Be it resolved, that the Board of Directors shall and it hereby does recommend a sale or lease or any combination of such of all or substantially all of the property and assets of the corporation upon such terms and conditions and for such consideration as the Board of Directors may fix and agree upon for and in behalf of the corporation and its stockholders by contract with a prospective buyer; and, Further, that said recommendation of such sale or lease or any combination of such of all or substantially all of the property and assets of the corporation be submitted to a vote at a special meeting of the shareholders, and that the secretary of the corporation be and he hereby is directed to issue and give notice of a special meeting of the shareholders of the corporation to be held on the 9th day of August, 1954, at 9:00 o'clock A.M., at the main plant building of the corporation in Sutherlin, Oregon, such notice to be given as required by the By-Laws of the corporation and the statutes of the state of Oregon.”

VIII.

Defendant Sutherlin Plywood Corporation sold its physical assets including the mill to defendant Nordic Plywood, Inc., in September, 1954.

IX.

Prior to purchasing the physical assets of defendant Sutherlin Plywood Corporation, defendant

Nordic Plywood, Inc. was advised by defendant Sutherlin of the existence of plaintiff's Exhibit I.

X.

Nordic Plywood, Inc. never intended to furnish plaintiff with 80% of the output of said mill.

XI.

Plaintiff has demanded that defendant Nordic Plywood, Inc. sell plywood to plaintiff in accordance with Exhibit 1 and has placed orders with defendant Nordic Plywood, Inc. to purchase plywood produced in said mill purportedly on the terms and conditions set forth in said instrument and defendant Nordic Plywood, Inc. has wholly failed and refused to fill said orders, or any of them, or otherwise to sell plywood to plaintiff in accordance with said instrument.

XII.

Production of plywood by defendant Sutherlin Plywood Corporation in said mill was as follows:

Month (1954)	Production (Board Feet)
January	1,097,648
February	1,095,969
March	1,553,678
April	481,431

Said mill did not operate from April 21, 1954 to September 15, 1954.

XIII.

The production of plywood by defendant Nordic Plywood, Inc. in said mill has been the following:

Month (1954)	Production (Board Feet)
September	884,000
October	1,980,377
November	1,961,479
December	2,534,493
1955	
January	2,524,718
February	2,434,718
March	2,897,534
April	2,654,318
May	2,799,217
June	2,872,088
July	2,855,621
August	3,528,836
September	3,140,084
October	3,770,300
November	3,282,582
December	
1956	
January	
February	

XIV.

No officer, director or stockholders of defendant Nordic Plywood, Inc. is or at any time since December 17, 1953, has been an officer, stockholder or director of defendant Sutherlin Plywood Corporation.

XV.

At all times herein mentioned the officers of plaintiff were and now are: President, Franklin A. Hofheins, Secretary, Robert F. Hofheins, Treasurer, Robert F. Hofheins, and the directors of plaintiff were and now are: L. L. Swan, Franklin A. Hofheins, Robert F. Hofheins, Alfred Young, Thomas S. Dennis.

At all times herein mentioned plaintiff was and now is engaged in purchasing and selling plywood.

At all times herein mentioned Oregon Plywood Corporation was and now is an Oregon corporation engaged in the operation of a plywood mill in Sweet Home, Linn County, Oregon. At all times herein mentioned the officers of Oregon Plywood Corporation were and now are: President, Franklin A. Hofheins, Vice-President, Robert F. Hofheins, Secretary, L. L. Swan, Treasurer, Robert F. Hofheins, and the directors of Oregon Plywood Corporation were and now are: L. L. Swan, Franklin A. Hofheins, Robert F. Hofheins, Alfred Young, Thomas S. Dennis.

At all times herein mentioned plaintiff was and now is a wholly owned subsidiary of Oregon Plywood Corporation.

XVI.

On December 17, 1953, the officers of Sutherlin were and now are: President, C. Millard Wood, Secretary, M. D. Steinbach, Treasurer, (Blank), Chairman of the Board of Directors, E. F. Cunningham, and its directors were: E. F. Cunningham,

C. Millard Wood, C. A. Petherick, Gerald Egan, M. D. Steinbach, Leo Sunnell.

XVII.

Defendant Nordic Plywood, Inc. was incorporated on September 3, 1954. Since its incorporation the officers of Nordic have been and now are: President, J. R. Adams, Secretary-Treasurer, Norman Jacobson, and the directors were and now are: J. R. Adams, Norman Jacobson, Raleigh Chinn.

XVIII.

Oregon Plywood Corporation loaned \$80,000.00 to defendant Sutherlin Plywood Corporation and said money was received by defendant Sutherlin Plywood Corporation. No further loans were made to defendant Sutherlin Plywood Corporation by Oregon Plywood Corporation. Said loan has been repaid to Oregon Plywood Corporation.

XIX.

Defendant Nordic Plywood, Inc. knew prior to its purchase of said mill from defendant Sutherlin Plywood Corporation that after said purchase defendant Sutherlin Plywood Corporation would be unable to furnish plywood to plaintiff from said mill. Said mill was the only mill ever operated by defendant Sutherlin Plywood Corporation.

Plaintiff's Contentions

1. Plaintiff and defendant Sutherlin Plywood Corporation entered into an agreement on or about December 17, 1953, whereby plaintiff agreed to:

(1) Procure a loan for defendant Sutherlin in the amount of \$80,000.00.

(2) Procure the purchase of the green veneer used by defendant Sutherlin.

(3) Use its best efforts to maintain a 30-day order file at defendant Sutherlin's mill for its product.

(4) Advance 80% of the mill value of defendant Sutherlin's product upon receipt of invoices therefor.

(5) Procure a deferment on repayment of said loan of \$80,000.00 if plaintiff did not furnish orders up to 80% of defendant Sutherlin's production.

and defendant Sutherlin agreed to:

(1) Grant plaintiff the right to purchase up to 80% of its output and to accept and ship plaintiff's orders within a reasonable time.

(2) Grant plaintiff the wholesale jobber's market price less 5% as compensation for plaintiff's services.

(3) Continue said sales agreement for 50 months.

2. Said agreement between plaintiff and defendant Sutherlin is evidenced by two written instruments signed by defendant Sutherlin on December 17, 1953, Exhibits 1 and 2.

3. Plaintiff performed its portion of said agreement but said agreement was breached by defendant Sutherlin's sale of its mill and by the failure of

either defendant to furnish plaintiff 80% of the output of said mill.

4. Defendant Nordic Plywood, Inc., unlawfully interfered with the agreement between plaintiff and defendant Sutherlin and induced a breach thereof and conspired with defendant Sutherlin to destroy plaintiff's rights under said agreement.

5. Plaintiff has suffered compensatory damages in the amount of 5% of the mill value of 80% of the product of said mill.

6. Plaintiff is entitled to punitive damages in the amount of \$100,000.00.

7. Defendants should be enjoined from operating said mill unless they furnish plaintiff 80% of the output of said mill for 47 months.

8. Plaintiff denies defendants' contentions.

9. Defendant Sutherlin represented that it intended to operate for at least 50 months and it acted in bad faith in ceasing operations and in disabling itself from further performance by selling its plant.

10. There is due plaintiff by defendant Sutherlin Plywood Corporation on open account the sum of \$3,824.78 pursuant to an account assigned to plaintiff by Oregon Plywood Corporation.

11. Plaintiff could not buy elsewhere at the same price promised in Exhibit 1.

12. Plaintiff is ready, willing and able to perform under Exhibit 1.

Defendant Sutherlin Plywood
Corporation's Contentions

I.

The instrument marked plaintiff's exhibit 1 and the purported grant by defendant Sutherlin Plywood Corporation to plaintiff of a right to purchase 80 per cent of the total output of defendant Sutherlin Plywood Corporation is not now and was never enforceable against or binding upon defendant Sutherlin Plywood Corporation for the following reasons:

(a) Said instrument and said purported grant were executed and made without any legally sufficient or adequate consideration.

(b) Said instrument and said purported grant are void under the statute of frauds, ORS 41.580, in that the terms of said instrument and said grant could not be performed within one year from the date thereof and neither said instrument nor any memorandum of said grant expresses any consideration therefor.

(c) If said instrument and said purported grant are otherwise valid and enforceable, they were executed and given in return for a contemporaneous loan of \$50,000 as evidenced by the note marked plaintiff's exhibit 3. The interest on said loan, together with the 5 per cent discount on the mill value of products shipped, provided for in plaintiff's exhibit 1, constituted a greater sum or value for the loan of money than that prescribed by ORS 82.010

and, accordingly, said instrument and grant are illegal and usurious.

II.

If said instrument and said purported grant were valid and enforceable contractual obligations, defendant Sutherlin Plywood Corporation was excused from further performing said obligations by reason of present and prospective material failure of consideration and numerous breaches thereof by plaintiff as follows:

(1) Plaintiff failed to advance 80 per cent of the mill value on each car of plywood shipped promptly upon receipt of invoice and original bill of lading.

(2) Plaintiff retained the entire price of numerous shipments of plywood after arrival of the railroad cars at destination and failed to remit to defendant Sutherlin Plywood Corporation therefor for an unreasonable length of time.

(3) Plaintiff failed to use its best effort to maintain with defendant Sutherlin Plywood Corporation a 30 days' order file at its mill.

(4) The orders placed by plaintiff with defendant Sutherlin Plywood Corporation were unprofitable.

III.

If said instrument and said purported grant were valid and enforceable contractual obligations, defendant Sutherlin Plywood Corporation at no time breached said obligations, and

(a) At no time failed to grant to plaintiff the

right to purchase up to 80 per cent of its output, and

(b) By the terms of said instrument and said purported grant, defendant Sutherlin Plywood Corporation had no obligation to maintain a particular or any output and was free to shut down its mill and thereafter to sell its mill to defendant Nordic Plywood, Inc., or

(c) If, under the terms of said instrument and said purported grant, defendant Sutherlin Plywood Corporation had any duty to maintain a particular or any output or any duty to refrain from selling its mill, nevertheless said duty was not violated in that the shutdown of said mill and the subsequent sale of the physical assets of the corporation, including said mill, were done in good faith and were made necessary by the poor financial condition of defendant Sutherlin Plywood Corporation.

IV.

If plaintiff is entitled to any relief in this action, it is not entitled to an injunction for the following reasons:

(a) Plaintiff's legal remedies are adequate.

(b) Plaintiff has been guilty of laches in that, although it knew long before the sale thereof that defendant Sutherlin Plywood Corporation intended to sell its mill, it nevertheless failed to raise any objection thereto or assert any rights under the instrument marked plaintiff's exhibit 1, thereby

misleading defendant Nordic Plywood, Inc., and inducing it to purchase said mill.

(c) Plaintiff has unclean hands in that plaintiff's exhibit 1 was part of an illegal and usurious transaction.

(d) Defendant Sutherlin Plywood Corporation has no control over said mill.

V.

If plaintiff is entitled to compensatory damages in this action, 5 per cent of the mill value of 80 per cent of the product of said mill is not the proper measure of such damages. Plaintiff is not entitled to more than nominal damages.

VI.

If plaintiff is entitled to any relief in this action, it is not entitled to punitive or exemplary damages from defendant Sutherlin Plywood Corporation for the reasons that:

(a) Plaintiff has waived its right to such damages by seeking relief in equity and it cannot obtain such damages and such equitable relief on the same cause of action.

(b) Such damages are not recoverable for breach of contract.

(c) If defendant Sutherlin Plywood Corporation breached its contractual obligations, its acts in that regard were done in good faith and without malice.

VII.

In the transactions between plaintiff and defendant Sutherlin Plywood Corporation arising out of

their account relationships in the sale and delivery of plywood and the purchase and receipt thereof by plaintiff under the instrument marked plaintiff's Exhibit 1, plaintiff became and now is indebted to defendant Sutherlin Plywood Corporation in the sum of \$4,101.39 as the balance of their mutual accounts over and above all payments made, the discounts and credits to which plaintiff was entitled under plaintiff's Exhibits 1 and 2, and the advances made by plaintiff to defendant Sutherlin Plywood Corporation. Plaintiff has failed and refused to pay said balance or any part thereof and defendant Sutherlin Plywood Corporation is entitled to judgment against plaintiff therefor in the sum of \$4,101.39, together with interest thereon at the rate of 6 per cent per annum from May 31, 1954.

VIII.

Defendant Sutherlin Plywood Corporation denies each of plaintiff's contentions.

Defendant Nordic Plywood, Inc.'s Contentions.

I.

The instrument marked plaintiff's exhibit 1 and the purported grant by defendant Sutherlin Plywood Corporation to plaintiff of a right to purchase 80 per cent of the total output of defendant Sutherlin Plywood Corporation is not now and was never enforceable against or binding upon defendant Sutherlin Plywood Corporation for the following reasons:

(a) Said instrument and said purported grant

were executed and made without any legally sufficient or adequate consideration.

(b) Said instrument and said purported grant are void under the statute of frauds, ORS 41.580, in that the terms of said instrument and said grant could not be performed within one year from the date thereof and neither said instrument nor any memorandum of said grant expresses any consideration therefor.

(c) If said instrument and said purported grant are otherwise valid and enforceable, they were executed and given in return for a contemporaneous loan of \$50,000 as evidenced by the note marked plaintiff's exhibit 3. The interest on said loan, together with the 5 per cent discount on the mill value of products shipped, provided for in plaintiff's exhibit 1, constituted a greater sum or value for the loan of money than that prescribed by ORS 82.010 and, accordingly, said instrument and grant are illegal and usurious.

II.

If said instrument and said purported grant were valid and enforceable contractual obligations, defendant Sutherlin Plywood Corporation was excused from further performing said obligations by reason of present and prospective material failure of consideration and numerous breaches thereof by plaintiff as follows:

(1) Plaintiff failed to advance 80 per cent of the mill value on each car of plywood shipped promptly upon receipt of invoice and original bill of lading.

(2) Plaintiff retained the entire price of numer-

ous shipments of plywood after arrival of the railroad cars at destination and failed to remit to defendant Sutherlin Plywood Corporation therefor for an unreasonable length of time.

(3) Plaintiff failed to use its best effort to maintain with defendant Sutherlin Plywood Corporation a 30 days' order file at its mill.

(4) The orders placed by plaintiff with defendant Sutherlin Plywood Corporation were unprofitable.

III.

If said instrument and said purported grant were valid and enforceable contractual obligations, defendant Sutherlin Plywood Corporation at no time breached said obligations, and

(a) At no time failed to grant to plaintiff the right to purchase up to 80 per cent of its output, and

(b) By the terms of said instrument and said purported grant, defendant Sutherlin Plywood Corporation had no obligation to maintain a particular or any output and was free to shut down its mill and thereafter to sell its mill to defendant Nordic Plywood, Inc., or

(c) If, under the terms of said instrument and said purported grant, defendant Sutherlin Plywood Corporation had any duty to maintain a particular or any output or any duty to refrain from selling its mill, nevertheless said duty was not violated in that the shutdown of said mill and the subsequent sale of the physical assets of the corporation, including said mill, were done in good faith and were

made necessary by the poor financial condition of defendant Sutherlin Plywood Corporation.

IV.

If said instrument and said purported grant were valid and enforceable contractual obligations of defendant Sutherlin Plywood Corporation and if defendant Sutherlin Plywood Corporation breached said obligations, said breach occurred long prior to defendant Nordic Plywood, Inc.'s purchase of said mill, and said purchase did not and could not interfere with the performance thereof or cause a breach thereof or defeat plaintiff's rights therein.

V.

If defendant Nordic Plywood, Inc., interfered with any contract between plaintiff and defendant Sutherlin Plywood Corporation, or caused a breach thereof or defeated plaintiff's rights therein, such act was in good faith, without malice and occurred by reason of defendant Nordic Plywood, Inc.'s competition with plaintiff for the production of said mill and by reason of the pursuit by defendant Nordic Plywood, Inc., of its legitimate economic interests. Accordingly, any such interference was privileged.

VI.

If plaintiff is entitled to any relief in this action, it is not entitled to an injunction for the following reasons:

- (a) Plaintiff's legal remedies are adequate.
- (b) Plaintiff has been guilty of laches in that,

although it knew long before the sale thereof that defendant Sutherlin Plywood Corporation intended to sell its mill, it nevertheless failed to raise any objection thereto or assert any rights under the instrument marked plaintiff's exhibit 1, thereby misleading defendant Nordic Plywood, Inc., and inducing it to purchase said mill.

(c) Plaintiff has unclean hands in that plaintiff's exhibit 1 was part of an illegal and usurious transaction.

VII.

If plaintiff is entitled to compensatory damages in this action, 5 per cent of the mill value of 80 per cent of the product of said mill is not the proper measure of such damages. Plaintiff is not entitled to more than nominal damages.

VIII.

If plaintiff is entitled to any relief in this action, it is not entitled to punitive or exemplary damages against defendant Nordic Plywood, Inc., for the reasons that:

(a) Plaintiff has waived its right to such damages by seeking relief in equity and it cannot obtain such damages and such equitable relief on the same cause of action.

(b) If defendant Nordic Plywood, Inc., unlawfully interfered with or induced the breach of any contract between plaintiff and defendant Sutherlin Plywood Corporation, all of defendant Nordic Plywood, Inc.'s acts in that regard were done in good faith and without malice.

IX.

Defendant Nordic Plywood, Inc., denies each of plaintiff's contentions.

Issues

1. Did the parties make the agreement described in plaintiff's contention number 1?
2. If said agreement or any agreement was made,
 - (a) is there sufficient consideration therefor?
 - (b) is it spurious?
 - (c) is it within the statute of frauds, and, if so, was there compliance with said statute?
3. Did defendant Sutherlin Plywood Corporation breach said agreement by the sale of its mill and by failure of either defendant to permit plaintiff to purchase 80 per cent of the output of said mill?
4. Was defendant Sutherlin Plywood Corporation excused from performance of said agreement by a material failure of consideration or by breaches by plaintiff?
5. If there was a valid and enforceable agreement and if it was breached by defendant Sutherlin Plywood Corporation, did defendant Nordic Plywood, Inc., unlawfully interfere with said contract and induce a breach thereof and conspire with defendant Sutherlin Plywood Corporation to destroy plaintiff's rights therein?
6. Should defendants be enjoined from operating said mill unless they furnish plaintiff 80 per cent of the output of said mill for 47 months?

7. What, if any, compensatory damages should plaintiff recover?

8. What, if any, punitive damages should plaintiff recover?

9. What amount, if any, should defendant Sutherlin Plywood Corporation recover on its counterclaim?

Plaintiff's Exhibits

1. Agreement between plaintiff and defendant Sutherlin Plywood Corporation dated December 17, 1953.

2. Agreement between Oregon Plywood Corporation and defendant Sutherlin Plywood Corporation dated December 17, 1953.

3. Note from defendant Sutherlin Plywood Corporation to Oregon Plywood Corporation.

4. Mortgage from defendant Sutherlin Plywood Corporation to Oregon Plywood Corporation.

5. Financial statements and reports of defendant Sutherlin Plywood Corporation.

6. Financial statements and reports of defendant Nordic Plywood, Inc.

7. Letter from George Luoma to plaintiff dated August 20, 1954.

8. Letter from George Luoma to plaintiff dated September 14, 1954.

9. Statement of account between plaintiff and defendant Sutherlin Plywood Corporation.

10. Correspondence between plaintiff and defendant Sutherlin Plywood Corporation.
11. Orders from plaintiff to defendant Sutherlin Plywood Corporation.
12. Schedule of plaintiff's orders canceled by defendant Sutherlin Plywood Corporation.
13. Invoices from Sutherlin Plywood Corporation to plaintiff.
14. Deposition of Harold Jacobsen.
15. Deposition of Charles Millard Wood.
16. Deposition of John Richard Adams.
17. Deposition of George Luoma.
18. Deposition of Marvin D. Steinbach.
19. Deposition of Charles Albert Pethric.
20. Deposition of Norbert L. Patterson.
21. Deposition of Eugene F. Cunningham.
22. Deposition of Snyder J. King.
23. Orders placed by plaintiff in October, 1954, and Nordic's reply.
24. Summary of plaintiff's open account claim.
25. Assignment of open account claim by Oregon Plywood Corporation to plaintiff.
26. Calls made by plaintiff trying to replace Sutherlin productions.
27. Douglas Fir Plywood Association Barometer Reports.
28. Crow's Weekly Letter.

Defendants' Exhibits

No.	Description
101.	Deposition of Robert Hofheins.
102.	Deposition of Norbert L. Patterson.
103.	Deposition of Charles Millard Wood.
104.	Deposition of George Luoma.
105.	Deposition of John Richard Adams.
106.	Deposition of Norman Harold Jacobson.
107.	Deposition of Marvin D. Steinbach.
108.	Deposition of Charles Albert Pethric.
109.	Deposition of Snyder J. King.
110.	Deposition of Eugene F. Cunningham.
111.	Deposition of Norman H. Pritchard.
112.	Instrument executed by plaintiff and defendant Sutherlin Plywood Corporation dated December 17, 1953.
113.	Agreement between Oregon Plywood Corporation and defendant Sutherlin Plywood Corporation, dated December 17, 1953.
114.	Note from defendant Sutherlin Plywood Corporation to Oregon Plywood Corporation, dated December 17, 1953.
115.	Mortgage from defendant Sutherlin Plywood Corporation to Oregon Plywood Corporation, dated December 17, 1953.
116.	Assignment from defendant Sutherlin Plywood Corporation to plaintiff dated April 28, 1954.
117.	Memorandum Agreement between defendant Sutherlin Plywood Corporation and plaintiff, dated April 5, 1954.

118. Notice to Creditors of defendant Sutherlin Plywood Corporation, dated August 24, 1954.

119. Earnest Money Receipt and Agreement between defendant Sutherlin Plywood Corporation and Norman Jacobson and J. R. Adams, dated August 16, 1954.

120. Conditions of Sale instrument by defendant Sutherlin Plywood Corporation to defendant Nordic Plywood, Inc., dated September 7, 1954.

121. Escrow Instructions from defendants Sutherlin Plywood Corporation and Nordic Plywood, Inc., to Seattle-First National Bank, dated September 7, 1954.

122. Escrow Instructions from Seattle-First National Bank to Commercial Abstract Company, dated September 24, 1954.

123. Note from defendant Nordic Plywood, Inc., to defendant Sutherlin Plywood Corporation, dated September 7, 1954.

124. Mortgage from defendant Nordic Plywood, Inc., to defendant Sutherlin Plywood Corporation, dated September 7, 1954.

125. Orders from plaintiff to defendant Sutherlin Plywood Corporation.

126. Invoices from defendant Sutherlin Plywood Corporation to plaintiff.

127. Invoices from defendant Sutherlin Plywood Corporation to the trade.

128. Correspondence between defendant Sutherlin Plywood Corporation and plaintiff.

129. Correspondence between defendant Sutherlin Plywood Corporation and Oregon Plywood Corporation.

130. Notice from defendant Sutherlin Plywood Corporation to Robert Hofheins, Jr., dated July 24, 1954.

131. Balance Sheets and Income Statements of defendant Sutherlin Plywood Corporation.

132. Accounting Records of defendant Sutherlin Plywood Corporation.

133. Balance Sheets and Income Statements of defendant Nordic Plywood, Inc.

134. Corporate Minute Book of defendant Sutherlin Plywood Corporation.

135. Corporate Minute Book of defendant Nordic Plywood, Inc.

136. Letter to J. R. Adams from C. John Newlands, dated June 28, 1954.

137. Letter to defendant Sutherlin Plywood Corporation from Weter, Roberts & Shefelman, dated June 28, 1954.

138. Letter to defendant Sutherlin Plywood Corporation from Theodore S. Bloom, dated June 10, 1954.

139. Telegram from E. Cunningham to Robert Hofheins, dated June 3, 1954.

140. Telegram from Robert F. Hofheins to E. Cunningham, dated June 4, 1954.

141. Letter from Oregon Plywood Corporation to Millard Wood, dated May 19, 1954.

142. Correspondence between James C. Dezen-dorf and George Luoma.

143. Summary of Computation of Counterclaim.

144. Orders and Invoices between plaintiff and Oregon Plywood Corporation.

145. Invoices for veneer purchased by Oregon Plywood Corporation for defendant Sutherlin Plywood Corporation.

146. Schedule of Discounts received by plaintiff from defendant Sutherlin Plywood Corporation.

147. Announcement of plaintiff, dated December 29, 1953.

148. Plaintiff's Price List of March 11, 1954.

149. Letter from Defendant's to Nordic dated Oct. 18, 1954.

150. Letter from Defendant's to Nordic Dated Oct. 19, 1954.

154. Reconciliation of Defendant's open account to 143.

The parties hereto agree to the foregoing pre-trial order, and the court being advised in the premises,

Now Orders that the foregoing pre-trial order shall not be amended, except by consent of both parties or to prevent manifest injustice; and it is further

Ordered that the pre-trial order supersedes all pleadings; and it is further

Ordered that upon the trial of this cause no proof shall be required as to matters of fact hereinabove specifically agreed to by the parties, but that proof

upon the issues of fact and law between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 27th day of March, 1956.

/s/ GUS J. SOLOMON,

Judge

Approved:

/s/ HERBERT H. ANDERSON,

Of Attorneys for Plaintiff

/s/ FREDRIC A. YERKE, JR.,

Of Attorneys for Defendants Sutherland Plywood Corporation and Nordic Plywood, Inc.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled-and-numbered action came on regularly for trial on March 27, 1956, before the Honorable Gus J. Solomon, judge of the above-entitled court. Plaintiff appeared by and through Herbert H. Anderson, one of its attorneys. Defendants appeared by and through Fredric A. Yerke, Jr., George A. Luoma, and Mark C. Clanahan, of their attorneys. The court having heard and considered all the evidence and statements of counsel, having examined briefs of the parties, having carefully considered all the issues of fact and law presented, and having rendered its opinion at the close of the

evidence, and being fully advised in the premises, does hereby make and enter the following:

Findings of Fact

I.

Plaintiff is a corporation incorporated under the laws of the State of New York and qualified to do business in Oregon. Defendants are corporations incorporated under the laws of the State of Oregon. The matter in controversy, exclusive of interest and costs, exceeds \$3,000.

II.

At all times herein mentioned the officers of plaintiff were and now are: President, Franklin A. Hofheins; Secretary, Robert F. Hofheins; Treasurer, Robert F. Hofheins; and the directors of plaintiff were and now are: L. L. Swan, Franklin A. Hofheins, Robert F. Hofheins, Alfred Yourg, Thomas S. Dennis. At all times herein mentioned plaintiff was and now is engaged in purchasing and selling plywood.

At all times herein mentioned Oregon Plywood Corporation was and now is an Oregon corporation engaged in the operation of a plywood mill in Sweet Home, Linn County, Oregon. At all times herein mentioned the officers of Oregon Plywood Corporation were and now are: President, Franklin A. Hofheins; Vice-President, Robert F. Hofheins; Secretary, L. L. Swan; Treasurer, Robert F. Hofheins; and the directors of Oregon Plywood Corporation were and now are: L. L. Swan, Franklin A. Hofheins, Robert F. Hofheins, Alfred Yourg, Thomas

S. Dennis. At all times herein mentioned plaintiff was and now is a wholly owned subsidiary of Oregon Plywood Corporation.

III.

Defendant Sutherlin Plywood Corporation was organized on November 1, 1951. During November, 1951, said corporation purchased a plant site at Sutherlin, Douglas County, Oregon, upon which were situated certain buildings and facilities formerly used in the operation of a sawmill. These buildings and a new building thereafter constructed were used to house the machinery required for the operation of a "plywood layup mill." The last of the major items of equipment required for the operation of said mill was delivered during October, 1953. Said mill was not designed to manufacture green veneer, but to process green veneer into plywood.

IV.

On December 17, 1953, the officers of Sutherlin Plywood Corporation were and now are: President, C. Millard Wood; Secretary, M. D. Steinbach; Treasurer, C. A. Petherick; Chairman of the Board of Directors, E. F. Cunningham; and its directors were: E. F. Cunningham, C. Millard Wood, C. A. Petherick, Gerald Egan, M. D. Steinbach, Leo Sunnell.

V.

On or about December 17, 1953, plaintiff and defendant Sutherlin Plywood Corporation executed the instrument which is plaintiff's Exhibit 1.

On or about December 17, 1953, defendant Sutherlin Plywood Corporation and Oregon Plywood Corporation entered into the agreement which is plaintiff's Exhibit 2, and defendant Sutherlin Plywood Corporation in accordance therewith executed and delivered to Oregon Plywood Corporation a note and mortgage, plaintiff's Exhibits 3 and 4.

VI.

In early January, 1954, pursuant to the provisions of the last paragraph of plaintiff's Exhibit 1, Robert F. Hofheins was elected to the board of directors of defendant Sutherlin Plywood Corporation, and he has remained a director on said board since that date.

VII.

Oregon Plywood Corporation loaned \$80,000 to defendant Sutherlin Plywood Corporation, and said money was received by defendant Sutherlin Plywood Corporation. No further loans were made to defendant Sutherlin Plywood Corporation by Oregon Plywood Corporation. Said loan was fully repaid to Oregon Plywood Corporation in November, 1954, as a part of the sale of defendant Sutherlin Plywood Corporation's physical assets hereinafter described.

VIII.

At the time the instrument marked plaintiff's Exhibit 1 was executed, plaintiff and Robert F. Hofheins, the person who conducted the negotiations on behalf of plaintiff which led to the execu-

tion thereof, had had extensive experience in the plywood industry and knew that the condition of the market was not favorable to the prospects of successful operation of a newly organized plywood company organized as was defendant Sutherlin Plywood Corporation. They knew the financial condition of defendant Sutherlin Plywood Corporation and that it was weak financially and was in dire need of working capital. They knew of and appreciated the risks that defendant Sutherlin Plywood Corporation might not be able to operate profitably and might be compelled to shut down. They knew of and appreciated the risk that the management of a small plywood company such as defendant Sutherlin Plywood Corporation might not be able to keep the mill in operating condition.

IX. [Struck out]

X.

Defendant Sutherlin Plywood Corporation completed construction of its plywood manufacturing facilities at Sutherlin, Oregon, in December, 1953. Operation of said mill commenced in early January, 1954, and continued until April 21, 1954, when production was terminated because of the poor financial condition of defendant Sutherlin Plywood Corporation and the generally poor market conditions in the plywood industry then existing. Said mill did not resume operations until September 15, 1954, as hereinafter set forth. The amount of plywood pro-

duced by defendant Sutherlin Plywood Corporation during 1954 was as follows:

Month (1954)	Production (Board Feet)
January	1,097,648
February	1,095,969
March	1,553,678
April	481,431

Its net losses during the first five months of 1954 resulted from its operations and were as follows:

Month (1954)	Net Losses
January	\$22,604.99
February	46,380.69
March	29,624.62
April	18,131.51
May	9,224.91
Total net losses	\$125,966.72

Neither plaintiff nor Oregon Plywood Corporation loaned additional money or extended any other financial assistance to defendant Sutherlin Plywood Corporation after the operation of said mill had ceased.

During the period of the operation of said mill by defendant Sutherlin Plywood Corporation, it employed approximately 100 persons and all but three of four of its employees were also stockholders of Sutherlin Plywood Corporation.

XI.

During the months of January, February and

March, 1954, defendant Sutherlin Plywood Corporation honored plaintiff's orders and Oregon Plywood Corporation purchased the green veneer which was used by defendant Sutherlin Plywood Corporation in its operations.

XII.

Defendant Sutherlin Plywood Corporation has not produced any plywood or supplied plaintiff with any plywood since April 21, 1956, except for small amounts left on hand at the time operations ceased.

XIII.

At the time defendant Sutherlin Plywood Corporation commenced operating said mill, it was weak financially and its capital was impaired. At the time it ceased operations, it was and at all times since that date it has been unable to pay its obligations as they matured.

XIV.

At the time defendant Sutherlin Plywood Corporation ceased operations, its working capital was completely depleted. Its secured and unsecured creditors were demanding payment of delinquent obligations. It had twice failed to meet its payroll on time, and had been threatened with labor liens. Its electrical power had been turned off because the bill therefor had not been paid. From the time it ceased operations until it sold its mill, expenses for the care and maintenance of said mill continued, but it lacked sufficient money to pay for its electrical power, the premiums for insurance for said mill, a watchman for said mill, or its creditors.

XV.

When its working capital became depleted, the directors of defendant Sutherlin Plywood Corporation, with the exception of Robert F. Hofheins, actively, diligently and persistently sought additional financing for the purpose of reopening the mill, but they were unsuccessful in their efforts to obtain it.

XVI.

In early June, 1954, the stockholders of defendant Sutherlin Plywood Corporation authorized its directors to seek to sell or lease said mill, and in early June, 1954, defendant Sutherlin Plywood Corporation decided it would sell or lease said mill, if possible. From that time forward it actively sought to find a possible buyer or lessee thereof and invited offers therefor.

XVII.

In July, 1954, defendant Sutherlin Plywood Corporation began negotiating for the sale of its mill. A special meeting of the board of directors of defendant Sutherlin Plywood Corporation was held on July 28, 1954, and was attended by the following directors: Robert F. Hofheins, E. F. Cunningham, C. Millard Wood, C. A. Petherick, Gerald Egan, M. D. Steinbach, Leo Sunnell.

At said meeting the following resolution was adopted:

“Be It Resolved, that the Board of Directors shall and it hereby does recommend a sale or lease or any combination of such of all or substantially all of the property and assets of the corporation upon such terms and conditions and for such con-

sideration as the Board of Directors may fix and agree upon for and in behalf of the corporation and its stockholders by contract with a prospective buyer; and, Further, that said recommendation of such sale or lease or any combination of such of all or substantially all of the property and assets of the corporation be submitted to a vote at a special meeting of the shareholders, and that the secretary of the corporation be and he hereby is directed to issue and give notice of a special meeting of the shareholders of the corporation to be held on the 9th day of August, 1954, at 9:00 o'clock A.M., at the main plant building of the corporation in Sutherlin, Oregon, such notice to be given as required by the By-Laws of the corporation and the statutes of the state of Oregon."

XVIII.

In early August, 1954, defendant Sutherlin Plywood Corporation accepted an offer from J. R. Adams and Norman H. Jacobson for the sale and purchase of its physical assets, including said mill; said offer had been made pursuant to said invitations for offers made by defendant Sutherlin Plywood Corporation. Thereafter said J. R. Adams and Norman H. Jacobson caused defendant Nordic Plywood, Inc., to be incorporated.

XIX.

Defendant Nordic Plywood, Inc., was incorporated on September 3, 1954. Since its incorporation the officers of Nordic Plywood, Inc., have been and now are: President, J. R. Adams, Secretary-Treasurer, Norman H. Jacobson, and the directors were

and now are: J. R. Adams, Norman H. Jacobson, Raleigh Chinn.

No officer, directors or stockholder of defendant Nordic Plywood, Inc., is or at any time since December 17, 1953, has been an officer, stockholder or director of defendant Sutherlin Plywood Corporation.

XX.

Defendant Sutherlin Plywood Corporation sold its physical assets, including the mill, to defendant Nordic Plywood, Inc., in September, 1954.

XXI.

By the terms of said sale, the installments on the purchase price were and are paid into escrow and distributed to the creditors, and any remaining equity will ultimately be distributed to defendant Sutherlin Plywood Corporation and its stockholders.

XXII.

At the time defendant Sutherlin Plywood Corporation ceased operations at said mill, at the time of the acceptance of said offer of J. R. Adams and Norman H. Jacobson, and at the time of said sale to defendant Nordic Plywood, Inc., defendant Sutherlin Plywood Corporation had already become disabled through no fault of its own from furnishing plaintiff with any output of said mill or honoring plaintiff's orders for plywood.

XXIII.

In ceasing operations, seeking to sell or lease its physical assets, and in selling its physical assets, defendant Sutherlin Plywood Corporation and the

officers, directors and stockholders thereof acted in good faith. The decisions so to do were the result of the exercise of honest and reasonable business judgment. At the time of said sale, defendant Sutherlin Plywood Corporation had no alternatives but to sell its physical assets or face continued and additional losses and, ultimately, bankruptcy.

XXIV.

Prior to purchasing the physical assets of defendant Sutherlin Plywood Corporation, defendant Nordic Plywood, Inc., was advised by defendant Sutherlin Plywood Corporation of the existence of Plaintiff's Exhibit 1.

Nordic Plywood, Inc., never intended to furnish plaintiff with 80 per cent of the output of said mill.

XXV.

Defendant Nordic Plywood, Inc., knew prior to its purchase of said mill from defendant Sutherlin Plywood Corporation that after said purchase defendant Sutherlin Plywood Corporation would be unable to furnish plywood to plaintiff from said mill. Said mill was the only mill ever operated by defendant Sutherlin Plywood Corporation.

XXVI.

Defendant Nordic Plywood, Inc., did not induce defendant Sutherlin Plywood Corporation to sell said mill. Defendant Sutherlin Plywood Corporation had decided to sell its physical assets prior to its negotiations with said J. R. Adams and Norman H. Jacobson.

XXVII.

There was no collusion, conspiracy or agreement

between defendant Sutherlin Plywood Corporation and defendant Nordic Plywoods, Inc., to destroy plaintiff's rights in the instrument marked plaintiff's Exhibit 1 and in consummating said sale defendant Nordic Plywood, Inc., acted in good faith and for the purpose solely of acquiring said physical assets for its own purposes. It had no purpose or intent to damage plaintiff or destroy its rights in said instrument.

XXVIII.

Defendant Nordic Plywood, Inc., has operated said mill since September 15, 1954, and the production of plywood by defendant Nordic Plywood, Inc., in said mill from said date through November, 1955, was as follows:

Month (1954)	Production (Board Feet)
September	884,000
October	1,980,377
November	1,961,479
December	2,534,493
(1955)	
January	2,524,718
February	2,434,718
March	2,897,534
April	2,654,318
May	2,799,217
June	2,872,088
July	2,855,621
August	3,528,836
September	3,140,084
October	3,770,300
November	3,282,582

Plaintiff has demanded that defendant Nordic Plywood, Inc., sell plywood to plaintiff in accordance with plaintiff's Exhibit 1, and has placed orders with defendant Nordic Plywood, Inc., to purchase plywood produced in said purportedly on the terms and conditions set forth in said instrument, and defendant Nordic Plywood, Inc., has wholly failed and refused to fill said orders, or any of them, or otherwise to sell plywood to plaintiff in accordance with said instrument.

XXIX.

There is due and owing by defendant Sutherlin Plywood Corporation to plaintiff upon its account assigned by Oregon Plywood Corporation the sum of \$3,924.78 computed as follows:

O.P.C. Account With Sutherlin

Veneer purchases for Sutherlin		
(Net after C/D)	\$214,346.87	
Mortgage Note Receivable—12/16/53	50,000.00	
Mortgage Addition—3/1/54	30,000.00	
Interest on Mortgage Note to		
10/15/54	2,335.01	
Veneer Deductions		\$162,883.36
Veneer Deduction Letter 3/15/54		6,637.31
Direct Remittance—Pacific Ply. 7/28/54		2,364.40
Assignment—Multi-Plyd. Car 162737		4,995.28
Western Door & Ply.		804.36
Coastal Lumber, Inc.		205.00
Mortgage Principal Payments—2/24/54		1,000.00
Mortgage Principal Payments 5/17/54		2,000.00
Mortgage Principal Payments 11/25/54		77,000.00
Mortgage Interest Payment—11/25/54		2,335.01
	<hr/>	<hr/>
	\$296,681.88	\$260,224.72
Balance due O.P.C.		\$ 36,457.16

O.P.S.C. Account With Sutherlin

Credit Memos on final settlements	\$ 32,754.79	
	182.53	
	482.26	
	<hr/>	\$ 33,419.58
Credit Frt. on Gov. cars		1,642.97
Credit Additional Adj.		1,870.91
Loss on cars accepted but not shipped by Sutherlin	1,526.80	
Expenses Car 66555—Letter 9/10/54	336.00	
Bal. due Assignment 4/5/54	2,538.28	
	<hr/>	<hr/>
	\$ 4,401.08	36,933.46
		4,401.08
		<hr/>
Balance due Sutherlin		\$ 32,532.38
Balance due O.P.C.	\$36,457.16	
Balance due Sutherlin	32,532.38	
	<hr/>	<hr/>
Balance due		\$ 3,924.78

XXX.

Defendant Sutherlin Plywood Corporation failed to prove its counterclaim and there is nothing due and owing by plaintiff to defendant Sutherlin Plywood Corporation.

Conclusions of Law

I.

This court has jurisdiction of the parties to and the subject matter of this action.

II.

By executing the agreements referred to in paragraph V of the Finding of Fact, defendant Sutherlin Plywood Corporation agreed to sell and ship to plaintiff up to 80 per cent of its actual production of plywood on orders furnished by plaintiff, but did not agree or promise to continue production of

plywood for any period of time, and in the event conditions made it unprofitable to continue or it was prevented from continuing in production it was to be relieved from furnishing any further production of plywood to plaintiff and from honoring further orders of plaintiff.

III.

By executing the agreements referred to in paragraph V of the Finding of Fact, defendant Sutherlin Plywood Corporation did not divest itself of the right to or agree not to dispose of its physical assets in the event it should determine to do so in good faith and in the exercise of honest business judgment or in the event conditions made it unprofitable to continue or it was prevented from continuing the production of plywood.

IV.

Plaintiff has failed to sustain the burden of proving that, prior to or at the time of the execution of said agreements, defendant Sutherlin Plywood Corporation guaranteed, promised or represented to plaintiff in any that defendant Sutherlin Plywood Corporation would continue in operation for at least 50 months or for any other period of time.

V.

Plaintiff has failed to sustain the burden of proving that defendant Sutherlin Plywood Corporation acted in bad faith in ceasing operations or selling its mill.

VI.

Defendant Sutherlin Plywood Corporation did

not breach said agreements by terminating production of plywood or by selling its physical assets, including said mill, to defendant Nordic Plywood, Inc., or by failing to furnish to plaintiff 80 per cent of the output of said mill after defendant Nordic Plywood, Inc., commenced operating it.

VII.

Defendant Sutherlin Plywood Corporation was excused from furnishing plaintiff with further production of plywood and from honoring further orders of plaintiff by reason of its financial losses, insolvency and inability to produce further.

VIII.

Plaintiff failed to sustain the burden of proving that defendant Nordic Plywood, Inc., interfered with said agreements or induced a breach thereof or conspired with defendant Sutherlin Plywood Corporation to destroy plaintiff's rights therein.

IX.

Defendant Nordic Plywood, Inc., did not unlawfully interfere with said agreements or induce a breach thereof or conspire with defendant Sutherlin Plywood Corporation to destroy plaintiff's rights therein and was not bound by them. It was privileged to purchase the physical assets of defendant Sutherlin Plywood Corporation.

X.

[Struck Out]

XI.

Plaintiff is entitled to no affirmative relief or damages against defendant Sutherlin Plywood Corporation for said alleged breach of contract.

XII.

Plaintiff is entitled to no affirmative relief or damages against defendant Nordic Plywood, Inc.

XIII.

There is due and owing to plaintiff by defendant Sutherlin Plywood Corporation the sum of \$3,924.78 and plaintiff is entitled to judgment against defendant Sutherlin Plywood Corporation in that amount.

XIV.

Defendant Sutherlin Plywood Corporation failed to prove its counterclaim, there is nothing due defendant Sutherlin Plywood Corporation by plaintiff and said defendant's counterclaim should be dismissed.

XV.

Neither plaintiff one the one hand nor defendants Sutherlin Plywood Corporation and Nordic Plywood, Inc., on the other are entitled to judgment against the other for their costs and disbursements incurred in this action.

Dated this 7th day of May, 1956.

/s/ GUS J. SOLOMON

Judge

Acknowledgment of Service Attached.

[Endorsed]: Filed May 7, 1956.

The United States District Court
For The District of Oregon

Civil No. 7754

OREGON PLYWOOD SALES CORPORATION,
a corporation, Plaintiff,

v.

SUTHERLIN PLYWOOD CORPORATION, a
corporation, and NORDIC PLYWOOD, INC.,
a corporation, Defendants.

JUDGMENT AND DECREE

The above-entitled-and-numbered action came on regularly for pretrial conference and trial on March 27, 1956, before the Honorable Gus J. Solomon, judge of the above-entitled court. Plaintiff appeared by and through Herbert H. Anderson, one of its attorneys, and defendants appeared by and through Fredric A. Yerke, Jr., George A. Luoma, and Mark C. McClanahan, of their attorneys. The court having heard and considered all the evidence and statements of counsel, having examined briefs of the parties, and having carefully considered all the issues of fact, and defendants having submitted findings of fact and conclusions of law, and copies of such findings of fact and conclusions of law having been served upon the attorneys for plaintiff, and such findings of fact and conclusions of law having now been filed, the court being fully advised in the premises, it is hereby

Considered, ordered and decreed that plaintiff

have judgment against defendant Sutherlin Plywood Corporation in the sum of \$3,924.78 on plaintiff's claim for balance on open account, and that plaintiff have execution therefor, and it is further

Considered, ordered and decreed that defendant Sutherlin Plywood Corporation's counterclaim for the balance on open account be dismissed, and that it take nothing thereby, and it is further

Considered, ordered and decreed that plaintiff's claims for injunctive relief and damages for breach of contract as against defendant Sutherlin Plywood Corporation and for interference with and inducement of breach of contract as against defendant Nordic Plywood, Inc., be and the same hereby are dismissed, and that plaintiff take nothing thereby.

Dated this 7th day of May, 1956.

/s/ GUS J. SOLOMON

Judge

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Oregon Plywood Sales Corporation, plaintiff above named, appeals to the Court of Appeals for the Ninth Circuit from so much of the judgment entered in this action on May 6, 1956 as disallows plaintiff's claim for injunctive relief and damages for breach of contract against defendant Sutherlin Plywood Corporation and for damages and punitive damages for interfer-

ence with and inducement of breach of contract against defendant Nordic Plywood, Inc.

Dated June 5, 1956.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF

/s/ HERBERT H. ANDERSON,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 6, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer and counterclaim of Sutherlin Plywood, answer of Nordic Plywood, reply to counterclaim of Sutherlin Plywood, answers to additional interrogatories of Nordic Plywood, supplemental answers to additional interrogatories of Nordic Plywood, pre-trial order, findings of fact and conclusions of law, judgment and decree, notice of appeal, bond for costs on appeal, statement of points, designation of record, defendants' supplemental designation, additional designation, order extending time to file and docket record, and transcript of docket entries, constitute the record on appeal

from a judgment of said court in a cause therein numbered Civil 7754, in which Oregon Plywood Sales Corporation, a corporation, is plaintiff and appellant, and the Sutherlin Plywood Corporation, a corporation, and Nordic Plywood, Inc., a corporation, are defendants and appellees; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by both appellant and appellees, and in accordance with the rules of this court.

I further certify that the transcript of testimony will be mailed when filed, and that the exhibits will be shipped later by the appellant.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court in **Portland**, in said District, this August 30, 1956.

[Seal]

R. DeMOTT,
Clerk,

/s/ By F. L. BUCK,
Chief Deputy.

United States District Court
District of Oregon

Civil No. 7754

OREGON PLYWOOD SALES CORPORATION,
a corporation, Plaintiff,

vs.

SUTHERLIN PLYWOOD CORPORATION, a
corporation, and NORDIC PLYWOOD, INC.,
a corporation, Defendants.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, Tuesday, March 27, 1956,
3:15 P.M.

Before: Honorable Gus J. Solomon, District
Judge.

Appearances: Mr. Herbert H. Anderson, of At-
torneys for Plaintiff; Messrs. Fredric A. Yerke,
Jr., and Mark C. McClanahan, of Attorneys for
Defendants.

Court Reporter: Gordon R. Griffiths. [1]*

ROBERT HOFHEINS

a witness produced in behalf of plaintiff, having
been first duly sworn, was examined and testified
as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Hofheins, are you
connected with the plaintiff? A. I am.

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of Robert Hofheins.)

Q. What is your capacity in regard to the plaintiff? A. I am secretary-treasurer.

Q. When did you first become aware—when did you contact Sutherlin Plywood Corporation?

A. I first contacted Sutherlin Plywood Corporation in, oh, November of 1953. I was going through Sutherlin, and we had word that they were building a new mill there that might be completed rather soon so I stopped in at their office to see if they had any plywood available for sale.

Q. What occurred at the meeting in November, 1953, at Sutherlin?

A. Well, I went into their office, and I had—I met one or two of the people that were around there, and I had a little discussion with them and indicated that I was interested in plywood sales. They indicated that they had their plant about ready for operation but that they were handicapped because of the lack of working capital. I indicated to them that we might be able to help them obtain some working capital, and at [15] that time it was arranged that they would send some people up to Sweet Home up to my office up there to talk further about the matter.

Q. Did the Sweet Home meeting take place?

A. It did.

Q. What happened at the meeting in Sweet Home?

A. Well, there was several representatives of Sutherlin Plywood came up to Sweet Home, and we had a little meeting in my office there, and we

(Testimony of Robert Hofheins.)

discussed in a general way their need of some working capital and our need of some material for sale, and we talked about the situation in more or less of a general way. I indicated that I thought I could get them the money that they needed, and they were very much interested in it.

At that time it was indicated that their plant was about ready to go into operation and that they planned on producing plywood and continuing to produce plywood, and we worked out roughly the basic points in the contract that were eventually involved.

Q. You say they planned on producing plywood?

A. That's right.

Q. Did they specifically advise you that they intended to continue operations? A. They did.

Mr. Yerke: Just a minute. We object to that as incompetent. [16] Anything that is going to be stated here, relied upon as part of the agreement, would relate to the agreement finally drawn up between the parties, and we object to any testimony concerning any discussion or any testimony concerning the details of a proposed agreement under the parol evidence rule. These discussions, if anything, would have been merged in the ultimate agreement which was signed December 17, 1953. We think this is important, your Honor, because we believe the witness is attempting at this time to lay the basis for testimony that there was a representation or that there was an agreement that there would be continuous productions and the agreement

(Testimony of Robert Hofheins.)

as finally drafted is in terms of output, and any testimony concerning an agreement for continuous production, under the parol evidence rule, would be inadmissible in view of the use of any of that wording in the agreement.

The Court: What have you got to say about that?

Mr. Anderson: I say that this does not apply to this situation, your Honor. There is authority that in this type of situation where we are trying to determine what the parties meant by "output" and whether or not they intended to continue production, that the representations made at the meetings are material and should be admitted.

The Court: But you first have to determine whether the contract is ambiguous. You cannot use parol evidence to create an ambiguity and then introduce parol evidence to explain that. [17] Let's see the contract and we will see if the contract is ambiguous.

Mr. Anderson: We contend, your Honor, that it specifically provides that they will produce.

The Court: Well then, you do not need this oral testimony.

Mr. Yerke: The rule on this point we have cited, your Honor, on page 13 of the memorandum we have handed to the Court. That is the parol evidence rule with respect to an output contract.

Mr. Anderson: There is a United States Supreme Court decision that says in this type of case the representations of parties are material in regard to the output, your Honor.

(Testimony of Robert Hofheins.)

Now, there are two points we contend; first, that the contract expressly requires them to continue production, and, secondly, if it should not be understood that the contract so provides, that there is an implied obligation, that in regard to this second point there is certainly an ample reason to admit this evidence.

The Court: What is your Supreme Court case?

Mr. Anderson: I do not have it here. I will have to look it up during the recess, your Honor. I do have the point in mind.

The Court: I will overrule this testimony until you have found the case. On your first point, Mr. Anderson, obviously you would not need this testimony. [18]

Mr. Anderson: At this time the Court so rules we will not need it?

The Court: Yes.

Mr. Anderson: The decision is in the first paragraph on page 3, about the middle of the page, about continuing production.

The Court: I think this would be a propitious time to consider exhibits. Mr. Anderson, I see your exhibits are marked 1 to 13, other than the depositions.

Mr. Anderson: We have set up, your Honor, some additional ones through to 28.

The Court: Are the depositions taken for discovery, or are they de bene esse depositions?

Mr. Anderson: Well, I think most of the wit-

(Testimony of Robert Hofheins.)

nesses are here and will testify, but it may be that——

The Court: Are you offering 1 to 13, inclusive, and 23 to 28, inclusive?

Mr. Anderson: Yes, your Honor. Well now, I beg your pardon, I have some doubts about the letters, that is, 7 and 8.

The Court: All right, exclude from that 7 and 8. All others are offered? Mr. Yerke, to which of the exhibits do you object?

Mr. Yerke: We will not object to the admission of Exhibits 1 to 6, inclusive. The statement of account, Exhibit 9, we will not object to that as far as any requiring any foundation [19] to be laid, but we are not conceding the accuracy of the statements contained therein.

The Court: Very well.

Mr. Yerke: On Exhibit 10, I don't know just how much of this correspondence he intends to put in. We intend to put in some of it, but it is a loose term, of course, as used there.

The orders which are Exhibit Number 11, we have no objection to them.

The Court: What about 12 and 13?

Mr. Yerke: We have no objection to the admission of Exhibit 13. We would like to reserve Number 12 for the time being.

On the depositions, they were all taken by plaintiff.

The Court: We are not worrying about the depositions now. How about 23 to 28? I am going to

(Testimony of Robert Hofheins.)

rule now that 1 to 6 are admitted and 9, 10, 11, and 13 are admitted.

(Thereupon, the documents previously identified as Plaintiff's Exhibits 1 to 6, both inclusive, and 9, 10, 11, and 13 were thereupon received in evidence.)

Mr. Anderson: May I say, your Honor, Number 9 has been supplemented by a later statement which is Number 24 and is actually out of date.

The Court: Do you want to withdraw Number 9?

Mr. Anderson: Yes, I want to withdraw Number 9 and substitute Number 24.

The Court: All right, 9 is not included.

(Thereupon, document previously identified and received as Plaintiff's Exhibit Number 9 was withdrawn.)

The Court: Mr. Yerke, did you see 23 to 28?

Mr. Yerke: We have no objection to 23, your Honor.

The Court: 24 you have not any objection to either?

Mr. Yerke: We do object to 24. We do not concede the accuracy in any way of it, and we question whether or not the underlying data is present here as far as that is concerned.

The Court: Do you have an accountant who will testify?

Mr. Anderson: We have the secretary-treasurer of the corporation, Mr. Hofheins, your Honor, who will testify to the summary of the open account.

The Court: I am not going to admit 24 now. Let the witness testify as to it.

Mr. Yerke: We have not seen Exhibit 25, the calls made by plaintiff, I don't know what that refers to. The barometer reference, of course, would be brought out by the Douglas Fir Plywood Association at Tacoma. We question the relevancy and materiality of the same. We will not object as far as the competency is concerned. As to Exhibit 28, our position is the same. [21]

The Court: I am not going to pass upon 23 to 28 at this time. Proceed.

Where did you tell me to look on that contract, page 1?

Mr. Anderson: Paragraph one provides that Sutherlin will accept and ship orders up to 80 per cent of the production, and on page 3 it provides that the contract will continue in effect for 50 months.

The Court: You say that that implies that Sutherlin will be in continuous operation during all of that period?

Mr. Anderson: I say that it both implies and expressly promises.

The Court: I know your point.

Mr. Anderson: I have another question which is along the same line. Perhaps the Court would prefer to defer that. That is in regard to shutdown, in regard to what discussions were had in regard to shutdown of the plant.

The Court: Give me that Supreme Court decision. This Court is bound by the Supreme Court.

(Testimony of Robert Hofheins.)

Mr. Anderson: Thank you.

(Thereupon, the direct examination of Mr. Hofheins was continued as follows):

Q. (By Mr. Anderson): What was the approximate date of the Sweet Home meeting?

A. Oh, I don't remember exactly, but it was in November or [22] December, 1953.

Q. Was that followed by further meetings between the parties? A. It was.

Q. What happened next?

A. Well, next we had a meeting in Eugene at the Eugene Hotel.

Q. What transpired at the Eugene meeting?

A. Well, at the Eugene meeting there were practically all of the board of directors and officers of the Sutherlin Plywood there, and we met in one of the rooms of the hotel which had a long table with a lot of chairs around it, and we all sat around the table, and we had—we discussed these questions of the contracts and our procuring the money for them, and at that time the contracts were finally drawn up in their final state, and they were signed, and I gave Sutherlin a check for \$50,000 for the first moneys.

Q. Were the contracts all one instrument or several?

A. No, there were two contracts drawn. Mr. Hoffman typed up two contracts, as I recall it. One was between Oregon Plywood Corporation and Sutherlin Plywood Corporation, and that was in connection with the mortgage and the additional

(Testimony of Robert Hofheins.)

\$30,000 if they needed it, and it also covered the matter of the payment for the veneer which they were going to use. Then there was a second contract which Mr. Hoffman typed up, and that was between Oregon Plywood Sales Corporation and Sutherlin Plywood Corporation, and that covered the selling of 80 per cent [23] of the output of Sutherlin Plywood and also covered the matter of the advance against their receivables.

Mr. Anderson: I would like to suggest, your Honor, that we would like to put in this evidence in its chronological relation, and we have charged in one of our contentions that the defendant, Sutherlin, did represent that it would produce continually, and we charge them with bad faith. I believe that aside from this other point that we should be entitled to put this evidence in under that contention, and, if possible, I would like to put it in its chronological order. I believe it could go in under that contention. It is contention nine, I believe, your Honor.

The Court: Who prepared this contract, who drafted this contract?

The Witness: The final draft of the contract was by Mr. Louis Hoffman who was attorney for Sutherlin Plywood.

Mr. Yerke: We will take issue with that, of course, your Honor. Our contention, of course, is that the witness prepared it.

The Witness: The contract was actually typed by Mr. Hoffman, I believe.

(Testimony of Robert Hofheins.)

The Court: Are you a lawyer?

The Witness: No, I am not.

The Court: I have never heard of Hoffman.

Mr. Anderson: A Eugene attorney, your Honor.

The Witness: He has an office on the main street down there on the second floor, and I remember quite vividly because I offered to do some of the typing for him, and he said he thought he could work it out himself.

The Court: What do you say about that, Mr. Yerke? On the question of fraud, don't you think that representations are admissible?

Mr. Yerke: They are not claiming fraud, your Honor. They are claiming that there was breach of contract by the defendant Sutherlin Plywood Corporation, and they are trying now to build in an obligation which, in fact, was not existence at any time and which actually is in conflict with the particular provision of the agreement previously referred to, and that is the word "output."

There is an annotation in 1 A.L.R. on this particular point. There it is stated the term output, which is what we are concerned with here, means a quantity of material put out or produced within a stated time. There is no occasion to refer to remembrance of facts and circumstances to explain any ambiguity therein. The only purpose of such reference would be to import into the contract an additional provision as to the quantity and this is true notwithstanding that in addition to the use of the term "output" the parties have included in the

(Testimony of Robert Hofheins.)

contract an estimate as to the amount of such output since such output is not stated as a reality. [25]

The Court: I am going to sustain the objection unless the testimony will not take very long.

Mr. Anderson: Just one question, your Honor.

The Court: Let it go in, and I will sustain the objection. I might tell you that as of this time I think I would place no credence in this statement unless you have some authority to support it.

Q. (By Mr. Anderson): Mr. Hofheins, what was represented to you during the discussion at Sweet Home and Eugene by the officers of Sutherland Plywood Corporation concerning continuing production?

A. They had the plant about ready to go, and they needed the money. As soon as they got money they would get into production and continue to produce plywood.

Q. What was represented concerning the length of time?

Mr. Yerke: Same objection, of course, your Honor.

The Court: Go ahead.

The Witness: That it would be at least during the duration of the contract.

Q. (By Mr. Anderson): For what period?

Mr. Yerke: The contract speaks for itself. We would object to leading the witness.

The Court: That is 50 months. Actually, Mr. Hofheins, they hoped to operate ten years, didn't they?

(Testimony of Robert Hofheins.)

The Witness: Or longer, your Honor; yes, sir.

The Court: Yes, everybody that goes into business hopes [26] that they are going to make money and operate.

Q. (By Mr. Anderson): Now, Mr. Hofheins, what action did Oregon Plywood Sales Corporation take after this contract was executed?

A. Well, we immediately started to obtain orders for Sutherlin, and we continued that effort, and we made an announcement to the trade, and we set out, we started ads in the trade paper journals such as the *Timberman* and the *American Lumberman*. We contacted some of our old accounts personally by mail, by telephone. We put on extra help in the office. We did all those things that you would visualize that you would normally do to do a selling job.

The Court: Is there any contention that the plaintiff was reluctant?

Mr. Yerke: We will not contend that the plaintiff failed to furnish orders. The contract, however, provides that the plaintiff would use its best efforts to maintain a 30-day supply of orders. We will contend that that was not fulfilled to the extent it was enforceable and——

The Court: What was the capacity of the plant?

Mr. Anderson: It is represented to be two and a half million at the the time these parties were engaged in this contract.

Mr. Yerke: Our position would be that it is

(Testimony of Robert Hofheins.)

about two million square feet per month; not two and a half. [27]

Mr. Anderson: Two to two and a half. Their manager stated two and a half.

Q. Mr. Hofheins, prior to the time you made the contract with Sutherlin had you been looking for another source of plywood? A. We had.

Mr. Yerke: Objected to as irrelevant, immaterial.

The Court: Yes, but he has already answered it.

Q. (By Mr. Anderson): Mr. Hofheins, after the contract with Sutherlin was made what efforts, if any, did you make in connection with other sources of plywood?

A. Well, immediately after the contract was made we devoted all our efforts to the Sutherlin agreement and stopped looking for an additional contract type of source.

Q. Mr. Hofheins, did the parties enter into operation and performance of this contract?

A. I didn't get the question.

Q. Did the parties enter the performance of this contract?

A. Yes, they did. Along after we had supplied Sutherlin with the orders that they requested, why, along in January they began to produce and started to ship, and they shipped from then until, well, they ran until late April, and they had some stock on the floor after they shut down, some cats-and-dogs, odds and ends, and we even cleaned those up for

(Testimony of Robert Hofheins.)

them. That was in May, I think, the last shipments came out. [28]

Q. Did the plaintiff advance the loan which it had promised? A. Yes.

Q. Or obtain an advancement of the loan?

A. It did.

Q. That was in what amount?

A. Well, eventually we advanced \$80,000 or got the advance of \$80,000 for them.

Q. Did the plaintiff make advances for the purchase of green veneer as it had promised?

A. It obtained the advances of green veneer up to, oh, around 215, 216 thousand dollars; yes, sir.

Q. Did the plaintiff make advances on invoices to Sutherlin?

A. It did in excess of, oh, \$160,000.

Q. Did the plaintiff use its best efforts to maintain a 30-day order file at Sutherlin?

A. Yes, sir.

Q. Did the plaintiff take from Sutherlin 80 per cent of its production?

A. It took—based on the information I have, it took more than 80 per cent.

Q. Did the plaintiff offer to defendant further financing in connection with the purchase of green veneer early in the spring of 1954? A. It did.

Q. What was the nature of that offer? [29]

A. Well, there was some rumors that there would be a strike in the industry. Mr. Franklin Hofheins got in touch with Mr. Patterson and ad-

(Testimony of Robert Hofheins.)

vised him of the rumors which we had heard and indicated to him——

The Court: Well, I think you cannot testify as to that.

The Witness: I was there when it happened.

The Court: Were you there?

The Witness: I was there in his office.

The Court: What month was that?

The Witness: That was, I think, in April.

Mr. Anderson: There is a letter in the correspondence file, your Honor—I think it is actually February—in which the letter suggested they line up suppliers for green veneer to supply veneer or something to that effect.

The Court: Go ahead with the testimony.

Mr. Anderson: I might say that this is over and above the terms of the contract, and I am just simply mentioning it as one of the additional things that the plaintiff did.

The Witness: Yes, they got in touch with Mr. Patterson and advised him of the rumors that we had had and suggested that it might be advantageous if they would put in additional green veneer which we, of course—which Oregon Plywood Corporation would finance for them so they would have a stock pile if the strike came along.

Q. How long did defendant Sutherlin operate?

Mr. Yerke: That is covered by agreed facts, Mr. Anderson.

The Witness: Three and a half months.

Q. (By Mr. Anderson): What did plaintiff do

(Testimony of Robert Hofheins.)

when it was notified that defendant Sutherlin would produce no more plywood?

A. Well, there was a—they verbally objected to it on several occasion. Then there was a letter written in May and another one in August.

Q. Did the plaintiff attempt to obtain plywood elsewhere? A. It did.

Q. What efforts were made in that connection?

A. Well, there were contacts made with a great many other mills by telephone, telegraph, and by personal contact by several parties from our organization, and they were unable to procure any plywood on any kind of a similar arrangement or at a similar price basis.

Mr. Anderson: To save time, your Honor, I may say that within the pleading filed are interrogatories several pages in length reciting the efforts made to obtain plywood elsewhere. I do not think it is necessary to put in any further evidence on that.

The Court: Very well.

Q. (By Mr. Anderson): Mr. Hofheins, what occurred——

Mr. Yerke: Your Honor, we are reserving all objection to this except with respect to attempts made by Norman Pritchard, a log buyer employed by Oregon Plywood Corporation. We took [31] his deposition. We have no objection to that portion of the interrogatories going into the evidence. However, on the remainder we have not had any

(Testimony of Robert Hofheins.)

opportunity to cross examine. The people concerned are back in Buffalo, New York.

Mr. Anderson: Mr. Thompson who made a number of those will be here, your Honor, and defendants will have an opportunity to cross examine him.

Q. Now, Mr. Hofheins, what occurred in the plywood industry in June of 1954?

A. There was a general strike in the industry.

Q. What happened to the plywood market at that time?

A. The market immediately became stronger and prices went up, and unfilled order files went up. The price went from \$76 in June of 1954 up to \$90 or better in September of 1954, August and September, and then that fall, as I recall, why, the unfilled order file was up the highest in the history of the industry.

Q. When you speak of price, to what grade are you referring?

A. Quarter-inch A.D. which is the base diameter used.

Q. That is called the index rating in the industry; is it not? A. That's right.

Q. Did you attend a directors' meeting of Sutherland Plywood Corporation in July, 1954?

A. I did.

Q. What was discussed at that meeting? [32]

A. Well, there was a resolution which had been prepared which was presented to the meeting about the sale or lease of Sutherland plant.

(Testimony of Robert Hofheins.)

Q. Was your opinion asked as to whether or not the plaintiff would approve a lease of the mill?

A. Yes, sir, and I stated that they would be opposed providing that we did not get the output.

The Court: On the lease?

The Witness: On the sale.

Mr. Yerke: That is what he testified to.

The Witness: On the sales.

The Court: Also on the sale?

The Witness: On the sales; yes, sir.

The Court: Where are the minutes of the meeting?

Mr. Yerke: We intend to offer them in evidence, your Honor. We have them.

The Court: Have they been exhibited to Mr. Anderson?

Mr. Anderson: I believe I saw the minutes in Roseburg, and I assume that they were all in the minute book at that time.

Mr. Yerke: That is correct; they were.

The Court: Do they show objection by Mr. Hofheins?

Mr. Yerke: No, your Honor, they show that the motion was made and seconded and carried. They show no objection. They do not show how he voted.

Mr. Anderson: I think that is correct. They [33] do not cover this point, your Honor.

Q. Mr. Hofheins, at the directors' meeting in July, what was primarily discussed, the lease or sale?

A. Well, I got the impression that it was primar-

(Testimony of Robert Hofheins.)

ily a sale. That was the basic discussion. I know I was presented with what was purported to be a financial statement, and about that time everybody was talking about selling the plant.

Q. In July had the market started to rise?

A. It had.

Q. What was the price in July?

A. Oh, I would say the price in July was right around \$85. That is probably a fair average.

Q. When did you first hear of the sale to Nordic?

A. When it was actually sold?

Q. When did you first hear of the sale?

A. Oh, in the fall. I would say in September, October some time.

Q. Did you hear of it before the sale was actually consummated?

A. No, sir.

Q. What has been the status of the plywood market from June, 1954, to the present?

A. It has been strong.

Q. What had been the prices?

A. All during 1955 the price was about \$85 with sometimes sheathing being a little bit higher, than that basis, and about the first of the year, this year, why, it went to \$88 to \$90. [34]

Q. Have you submitted orders to defendant Nordic Plywood, Incorporated?

A. Yes, sir.

Q. When were those orders submitted?

The Court: Well, I don't think you ought to go into that. Nordic states they won't accept any of those orders.

Q. (By Mr. Anderson): Mr. Hofheins, was the

(Testimony of Robert Hofheins.)

contract that you had with Sutherlin Plywood Corporation profitable to the plaintiff?

A. Yes, sir.

Q. Mr. Hofheins, have you suffered damages in regard to the alleged breach of this contract?

A. We have.

Q. Concerning the period from April 15, 1954, to September 15th when Nordic started operating the mill, a five-month period, what production should Sutherlin have delivered to you?

Mr. Yerke: Objected to as incompetent. The witness is not qualified to answer that; no foundation laid for the same either.

The Court: Ask him what orders he had. I think that is the situation. I would be interested in knowing what orders they got that they could have submitted.

Q. (By Mr. Anderson): Mr. Hofheins, during the period April 15th to September 15, 1954, did you have orders for which you could have used plywood from defendant Sutherlin? [35]

A. Yes, sir.

Q. Could you tell us the amount of the orders that you had?

A. Well, I would say that roughly in May and June we could have submitted, oh, not less than a hundred thousand dollars a month to them for those two months, and then beginning in June with your strike, why, we could have submitted substantially more than they would have been able to produce on the basis of their equipment.

(Testimony of Robert Hofheins.)

The Court: May and June?

The Witness: It would run over \$200,000 a month.

The Court: You mean in July and August?

The Witness: Yes; that's right.

The Court: If there was a strike in the industry, how could they have been producing if they depend upon their veneer from someone else?

The Witness: Well, not all of the veneer mills, Judge, are union.

The Court: Was this a union plant?

The Witness: No, sir.

Q. (By Mr. Anderson): Mr. Hofheins, are you familiar with the production of the mill when Sutherlin was operating it?

A. I am familiar in a general way with the figures that they submitted to me, yes, sir.

Q. Those are agreed upon. For the Court's information I will state that they range from approximately a million in [36] January, approximately a million in February, a million and a half in March, 481,000 in April.

The Court: Are you talking about the production up to April?

Mr. Anderson: Yes, your Honor.

The Court: It is stipulated in the pre-trial order.

Mr. Anderson: Yes, I just mentioned that.

Q. Now, Mr. Hofheins, could you have produced orders for 80 per cent of the same production after Sutherlin shut down?

A. Yes, sir.

(Testimony of Robert Hofheins.)

Q. What profit would you have made out of this sales contract?

A. Well, we would have made during that period, we would have made not less than \$500,000 a month on that basis.

Mr. Yerke: Just a minute, what did you say?

The Witness: Not less than \$5,000 a month on the basis of production which they at that time had, and the fact that their mill was new and the fact that their mill was capable of larger production, and the figures indicated that it was working in the latter productions.

Mr. Yerke: We move to strike all this testimony on the ground of no foundation laid. The witness is not qualified. The testimony is incompetent.

The Court: No foundation has been laid. I thought you were going to submit orders that the Oregon Plywood Sales Corporation received during this period. Don't you have those orders? [37]

Mr. Anderson: I don't know whether we have the orders here, your Honor. Here is a witness who testified that they could have taken the 80 per cent, and they had sales for it. They did submit orders to Sutherlin, and they were rejected.

The Court: I thought that that was what either you or someone else who came before me said some six or eight months ago in some interrogatories. Wasn't that price question involved at that time?

Mr. Yerke: Those, I think, your Honor, were the invoices from Sutherlin to Oregon Plywood Sales Corporation together with the orders from

(Testimony of Robert Hofheins.)

Oregon Plywood Sales Corporation to Sutherlin. The witness now, of course, is attempting to testify as to what might or might not happen under a variety of circumstances, and I believe the question is pointed to the orders which Oregon Plywood Sales Corporation would have had from its customers which it in turn would have turned around presumably and have forwarded to the mill. We have not inspected such documents. They have not been listed in the pre-trial exhibits by the plaintiff.

Mr. Anderson: Well, now, that would be corroborated——

The Court: How can your man testify as to what orders he would have gotten during that period?

Mr. Anderson: They had the orders, your Honor. We can obtain the written orders, the corroboration of his statement, [38] but he testifies that they had the orders. That is the testimony we are producing at this time, and that they were unable to fill those orders because they were not getting the 80 per cent of output of this mill.

Mr. Yerke: But you are going also to have to establish, Mr. Anderson, in view of the provisions of your contract that the orders would also have been profitable to Sutherlin Plywood Corporation because Sutherlin under the provisions of your contract had the right to refuse any orders which were unprofitable.

Mr. Anderson: Well, that point——

The Court: I am going to let the evidence in. I think that we will get along faster if we let most

(Testimony of Robert Hofheins.)

of the evidence in, but let me admonish you, Mr. Anderson and Mr. Yerke, do not go too far.

Q. (By Mr. Anderson): Mr. Hofheins, when you say that you would have made \$5,000 a month during this five-month period, what do you base that upon? A. On 5 per cent of a thousand dollars.

Q. Would you have had expenses in connection with handling that hundred thousand dollars worth of sales? A. Yes, sir.

Q. What would those have been per month?

A. Oh, I would say in the neighborhood of seven hundred fifty to a thousand dollars a month.

Q. So that would leave a loss of how much [39] per month when you did not get the production?

A. Between \$4,250 and \$4,000.

Q. Do you know whether or not the mill has been operated since September 15, 1954, to the present? A. I understand that it has been.

Q. Have you seen the production records of the mill? A. I have.

The Court: They are all stipulated.

Mr. Anderson: They are here, your Honor.

The Court: In paragraph 13.

Q. (By Mr. Anderson): It is agreed that the production of Nordic has been on an average in excess of 2,000,000 feet per month since September 15th. What would have been your profit had you received 80 per cent of the production?

Mr. Yerke: We do put in an objection to that, your Honor, on the grounds there has been no establishment of a similarity of circumstances with respect to the two operations, and, in fact, the phy-

(Testimony of Robert Hofheins.)

sical circumstances are vastly different, which counsel well knows.

The Court: What do you mean, "physical circumstances"?

Mr. Yerke: The plant has been remodeled. There is additional equipment in, and some shortcomings which originally contributed to the losses which were sustained and the low production during the shake-down period have been eliminated. In addition there has been a vast amount of equipment [40] put in there.

Mr. Anderson: I think that goes to the weight of it, your Honor. All we are asking now is as to what would have been the profit had they received 80 per cent of 2,000,000 feet per month which has been produced.

The Court: He may answer the question.

The Witness: May I have the question again, please?

Mr. Anderson: Perhaps I had better restate it.

Q. What would have been plaintiff's profit had you received 80 per cent of the production produced in the mill after September 15, 1954?

A. Well, based on its actual production it would, of course, have been 5 per cent of the mill——

The Court: That is \$10,000 a month, and it would cost you about \$2,000 a month to operate so you would have about \$8,000 a month profit.

The Witness: Thank you, sir.

The Court: All right, go ahead.

Q. (By Mr. Anderson): Mr. Hofheins, do you have an open account claim in this lawsuit?

(Testimony of Robert Hofheins.)

A. We do. [41]

(Document, Summary of plaintiff's open account claim, marked Plaintiff's Exhibit 24 for identification.)

(Document, Assignment of open account claim by Oregon Plywood Corporation to plaintiff, marked Plaintiff's Exhibit 25 for identification.)

Q. (By Mr. Anderson): Mr. Hofheins, what is the document handed to you marked Exhibit 24?

A. This is a summary of the cardinal points of our balance-due claim against Sutherlin Plywood.

Q. Mr. Hofheins, who prepared this summary?

A. I prepared this summary.

Q. What is the amount which is shown owed by Sutherlin according to this summary?

Mr. Yerke: Objected to as incompetent, no foundation has been laid for the same. The foundation documents have not been brought in, and the witness' competency has not been demonstrated.

The Court: Do you have the documents here?

Mr. Anderson: I think we have the supporting data, your Honor, although it is quite voluminous. I may say for the Court's information that the defendants have a statement likewise, and it is suggested that we confer on these statements and try to reduce the items of difference to the minimum.

The Court: I think that is a very good suggestion. Obviously, there are some of these items about which there is no dispute. [42]

Mr. Yerke: That is right, your Honor. We were

(Testimony of Robert Hofheins.)

concerned about the disputed items, and that is why the objection was made.

The Court: The amount claimed is \$3,824.78; isn't that right?

Mr. Anderson: That is right.

The Court: I see one item here, "Loss on cars accepted but not shipped by Sutherlin." Is there a dispute about that item of \$1,526?

Mr. Yerke: Most of those items, your Honor, relate to the unliquidated damage claims, and we question the right of plaintiff to have asserted them in this lawsuit. The contention in question is an open account. That is what this is supposedly based on. Those are unliquidated damage claims based upon a contention of underselling to others than the plaintiff, and that contention is disputed by the defendant Sutherlin Plywood Corporation.

Mr. Anderson: Well, I think we may be able to get together on several of these items.

The Court: Why don't you do that, Mr. Anderson.

Mr. Anderson: I would like at this time to have the witness state his qualification to answer in regard to the amount due as to whether or not this comes from the books and records of the company.

The Court: Very well, go ahead. [43]

Mr. Yerke: We may have our objection, your Honor?

The Court: Yes, that is right.

Q. (By Mr. Anderson): Mr. Hofheins, have

(Testimony of Robert Hofheins.)

you prepared this from the books and records of the plaintiff?

A. I got the specific information from our book-keepers, and then I prepared the summary from that information.

Q. Those things represent the amount which is still owing from defendant Sutherlin Plywood to the plaintiff? A. It does.

Mr. Anderson: I understand that all the exhibits except 23 to 28 are received.

The Court: Yes, do you want to introduce any of those exhibits through this witness, 23 to 28?

Mr. Anderson: Yes, your Honor.

The Court: Go ahead.

Mr. Anderson: Do you wish to have all those identified, Mr. Yerke, or may we agree that they shall all be admitted?

Mr. Yerke: I thought that we had indicated we had no objection to 23.

The Court: 23 is admitted.

(Document previously identified as Plaintiff's Exhibit 23 was thereupon received in evidence.)

Mr. Anderson: As I understand it, there were no objections to 1 through 13? [44]

The Court: Those are all admitted. We have admitted some of those already. We are only working on 24 to 28, and I am going to withhold action on 24 at this time.

Mr. Anderson: We offer 25.

(Testimony of Robert Hofheins.)

The Court: You had better show it to the witness first.

Mr. Anderson: The witness has it.

Mr. Yerke: We do not object to it. That is all right.

The Court: 25 is admitted.

(Document previously identified as Plaintiff's Exhibit 25 for identification was received in evidence.)

The Court: What about 26? Have you got 26?

The Witness: No, sir; I have.

Mr. Anderson: 26 is embraced in the interrogatories.

Mr. Yerke: We have never seen that. That is apparently an attempt to place into evidence the interrogatories that we have not had an opportunity to cross-examine anyone on except Norman Pritchard. If you want to put in that portion of the interrogatories relating to his efforts together with the deposition, we have no objection.

Mr. Anderson: We will wait until Mr. Thompson arrives.

The Court: I am going to admit 27 and 28 for what they are worth.

Mr. Anderson: I do not have 27 here, your Honor, but I do not think it will be necessary because it is embraced [45] in 28. It will be a duplication.

The Court: 27 is not admitted; 28 is.

(Exhibit 27 not submitted.)

(Testimony of Robert Hofheins.)

(Document previously identified as Plaintiff's Exhibit 28 for identification was received in evidence.)

The Court: Mr. Yerke, I think that the witness is yours.

Mr. Anderson: Yes, sir, that is correct.

Cross Examination

Q. (By Mr. Yerke): This representation that you referred to, Mr. Hofheins, that was made also at Sutherlin, was it, when you first went down to the mill?

A. No, I didn't say that, sir.

Q. It was not made at that time?

A. You mean the representation of the fact that they were going into production and continue to produce?

Q. That is what I have in mind, yes.

A. No, no, that to the best of my recollection came out in Sweet Home to begin with, that meeting there.

Q. Who made the representation to you at Sweet Home?

A. I don't recall exactly who it was. There were several members from Sutherlin, and my impression was that we talked about the whole thing, and they very definitely stated that they were going into the plywood production and would continue to produce plywood with their new mill. [46]

Q. But you do not recall the exact individual that made that representation?

A. No, that was two and a half years ago, Mr. Yerke.

(Testimony of Robert Hofheins.)

Q. There apparently was one meeting at Eugene at the Eugene Hotel; is that correct?

A. That is correct; right; yes, sir.

Q. Isn't it correct that there were two meetings?

A. I don't recall them, sir.

Q. You don't recall? A. No.

Q. Do you recall attending a meeting at the Eugene Hotel on December 6, 1953, with the members of the board of directors of Sutherlin?

A. No, the one that I recall was the one where we had the back room with the table.

Q. Do you recall after one of these meetings hurrying to meet the plane or to catch a plane at Eugene, West Coast Airlines or United Air Lines?

A. No, but that is entirely probably because I am doing that all the time.

Q. Do you recall being at a meeting in Eugene alone, that is, alone with the board of directors of Sutherlin, without any other persons that were appearing on behalf of Oregon Plywood Sales Corporation?

(Witness shakes head.) [47]

Q. Your answer is No?

A. No, that's right.

Q. The only meeting you recall then apparently is that meeting where the contracts were signed?

A. That's right.

Q. And the contracts recite that they were signed on December 17, 1953. That is your recollection of the date of the meeting?

A. That's my recollection; yes, sir.

(Testimony of Robert Hofheins.)

Q. Didn't you type out the drafts of those contracts? A. No, sir.

Q. You do not recall doing that?

A. No, I do not.

Q. Do you recall typing out the drafts and then going down to make the corrections with Mr. Hoffman in his office?

A. I remember we went down to Mr. Hoffman's office, and we had—at the meeting we had a rough draft of what had been proposed, as I recall it, and then Mr. Hoffman took that, and as I recall it, he made changes in it and revamped it and so forth and so on, and then he went over to his office, and I recall that I went over with him.

The Court: I do not think he has to go into that any further, Mr. Yerke. This is an unusual contract, and Mr. Hofheins has indicated he is not a lawyer. Do you think he could draft a contract of this kind? [48]

Mr. Yerke: I think that he has done some work similar to that in the past. I was going to ask him about it.

Q. Let me ask you this. Did you have a lawyer with you at that meeting, a Mr. Swan?

A. Mr. Swan was with me at the meeting, yes.

Q. He was a lawyer representing Oregon Plywood Sales Corporation?

A. No, Mr. Swan was the secretary and director of Oregon.

Q. He is also secretary and director of Oregon Plywood?

(Testimony of Robert Hofheins.)

A. No, I say, he is secretary and director of Oregon Plywood Corporation.

Q. Is he an officer of Oregon Plywood Sales Corporation? A. No, sir.

Q. Is he a director?

A. He is a director; yes, sir.

Q. So he is a director of both corporations?

A. Yes, sir.

Q. He resides down at Sweet Home, Oregon, does he? A. No, sir; Albany, Oregon.

Q. Who else was present representing Oregon Plywood Sales Corporation? A. Nobody.

Q. What about Mr. Sadoff, assistant treasurer?

A. Mr. Sadoff was the office manager of Oregon Plywood Sales Corporation at that time. [49]

Q. You mean Oregon Plywood Corporation?

A. I mean Oregon Plywood Corporation. I am sorry.

Q. He was present; was he not?

A. He was present; yes, sir.

Q. Have you ever prepared any instruments before similar to what has been marked and received in evidence as Plaintiff's Exhibit 1?

A. No, I have never written a contract of that description.

Q. Oregon Plywood Sales Corporation has entered into a number of those contracts, has it not, similar contracts?

A. Not to my knowledge; no, sir.

Q. It has entered into none?

A. Not to my knowledge; no, sir.

(Testimony of Robert Hofheins.)

Q. What about Oregon Plywood Corporation?

A. No, sir, they have——

Q. Oregon Plywood Corporation has not either, you say? A. No, sir.

Q. You live in Buffalo, New York?

A. Yes, sir.

Q. You are out here just occasionally?

A. I am out here approximately once a month, sir.

Q. Did you read the complaint in this case after it was prepared by Mr. Anderson's office?

A. I think I have.

Q. And you approved the form of the complaint? [50]

A. I wouldn't know what you mean by that, sir.

Q. Was the complaint accurate and correct, so far as you were concerned?

A. So far as I recall, yes, sir.

Q. Did you take issue at all with the following language from paragraph II of the complaint:

"Plaintiff and defendant Sutherlin Plywood Corporation are parties to a contract whereby plaintiff was and is engaged—was and is granted the first right and option to buy at prices therein provided 80 per cent of defendant's output of plywood upon terms and conditions therein set forth."?

The question was, did you object to that at the time you read the complaint?

Mr. Anderson: I will object, your Honor. The complaint is not signed and verified by the parties.

The Court: That is the reason he asked if he

(Testimony of Robert Hofheins.)

be provided [53] with a copy of the deposition so he can examine it?

The Court: Yes.

Mr. Yerke: That is page 15. I am sorry.

The Witness: They are both correct, Mr. Yerke. Let me call your attention to the fact that when you asked a question a few minutes ago you asked if Oregon Plywood Sales Corporation had entered into any sales contracts. I said no. In this the question was asked if I had ever entered into any contracts. I said yes.

Q. (By Mr. Yerke): What contracts have you entered into?

A. Well, as an officer of other corporations, I have entered into sales contracts.

Q. A number of them?

A. Oh, I would say possibly two; maybe three. I don't recall exactly how many.

Q. You are familiar then with the general subject matter of such contracts, aren't you?

A. I would say in a general way; yes, sir.

Q. You testified concerning the meeting of the board of directors on July 28, 1954. That same meeting is referred to in the pre-trial order. You recall that meeting, do you not?

A. I do, sir.

Q. Were you handed a form of resolution that was to be adopted by the board or was under consideration by the board at that time? [54]

A. Yes, sir.

(Testimony of Robert Hofheins.)

Q. Did you suggest a change in the resolution before it was voted on? A. I did, sir.

Q. Did that particular suggestion relate to a leasing of the assets as distinguished from a sale of the assets? A. I believe that it did.

Q. Then when the resolution was voted on, how did you vote? A. I voted against it.

Q. How did you indicate your vote? Did you voice a No, or did you raise your hand, or what did you do?

A. Oh, I wouldn't remember that, Mr. Yerke.

Q. Did anyone else vote against it?

A. I don't recall.

The Court: Did you ask that your votes be recorded?

The Witness: I don't remember that I did, Judge, or I don't remember that I didn't.

The Court: Did anyone else besides yourself know that you voted against the resolution?

The Witness: I think that—it was my impression that I had expressed myself that unless the contract with the sales contract was to follow that I was against anything of that nature. I think I discussed that.

The Court: Tell me specifically about that.

The Witness: Well, of course, when the resolution was [55] up, came in, this resolution which had been drawn prior to the meeting, and it was presented, and I raised an objection to it.

The Court: What was the objection that you raised?

(Testimony of Robert Hofheins.)

The Witness: Well, the fact that there had been nothing included in there about sales contracts.

The Court: You insisted or you contended that any sale or lease must honor the contract that you had entered into with the Sutherlin Plywood Corporation on the 17th of December, 1953?

The Witness: Yes, sir.

The Court: Then when the time came to vote you voted against the contract?

The Witness: Yes, sir—against the resolution, sir. I didn't vote against the contract.

The Court: Against the resolution, all right.

Q. (By Mr. Yerke): Then following the matter did you assist in stuffing the envelopes with the notices to the stockholders of the voting on this resolution at the proposed stockholders' meeting?

A. I believe that I did.

Q. You did not attend that meeting, the stockholders' meeting, did you? A. No, sir.

Q. You were advised that the meeting was to be held?

A. I was advised that there was to be a meeting to be held; [56] yes, sir.

Q. You were advised also of the board of directors' meeting which occurred after the stockholders' meeting?

A. No, sir, I don't believe I was.

Q. You testified that you first heard of this sale to Nordic Plywood, Incorporated in September or October? A. Yes, sir.

Q. Didn't you as a creditor of Sutherlin Ply-

(Testimony of Robert Hofheins.)

wood get, receive a notice to creditors during the month of August, 1954?

A. Not that I recall; no, sir.

Q. When I say "you" I mean Oregon Plywood Sales Corporation or Oregon Plywood Corporation.

A. Not that I know of, sir. I don't recall it.

Q. Isn't it a fact, Mr. Hofheins, that, if you know, that the veneer plants that were supplying veneer to Sutherlin Plywood were union plants, or do you know?

A. No, I don't know. What was the date of that notice to creditors, Mr. Yerke?

Q. August 24th, I believe, 1954.

A. No, I don't recall anything like that.

Q. Do you recall a registered letter arriving in your office concerning that? A. No.

The Court: Mr. Hofheins, didn't you make inquiry about how Sutherlin Plywood Corporation was getting along during the [57] months of July, August, September?

The Witness: They had substantial assets, your Honor.

The Court: Weren't you concerned about the fact that the plant was down?

The Witness: Yes, sure.

The Court: What did you do about it?

The Witness: Well, we—in May we—

The Court: I am talking about in August and September.

The Witness: Well, in August, on August 12th we wrote them a letter in connection with the fact.

(Testimony of Robert Hofheins.)

The Court: But you never went over to the plant at Sutherlin?

The Witness: No, sir.

The Court: You were in Oregon in August, and you were also in Oregon in September?

The Witness: No, not in August, sir. You see, the strike was on. I was here in July, and I attended that meeting, and then I was not in Oregon again until after the strike was over.

The Court: When was that?

The Witness: In September.

The Court: You did not communicate with any of the officers of Sutherlin Plywood Corporation to find out what progress was being made in connection with a sale or leasing of the plant?

The Witness: No, sir, I—at the July meeting I endeavored to find out the names of some of the people that they might [58] have who were interested, and I was not successful in getting that information, your Honor.

Q. (By Mr. Yerke): You commenced serving as a director on the board of directors of Sutherlin Plywood Corporation right after the first of the year in 1954; did you not?

A. Well, it was after the contract was signed, yes, sir.

Q. During the month of January?

A. I don't recall exactly when it was, but I know it was right after the contract was signed.

Q. You have never resigned? A. No.

(Testimony of Robert Hofheins.)

Q. When did you first contact Mr. Dezendorf at Mr. Anderson's office concerning this matter?

Mr. Anderson: If the Court please, I believe that is going beyond the scope of the direct examination. Perhaps it is part of the defendants' own case. I object to it at this time.

The Court: I do not see the relevancy anyway.

Mr. Yerke: We will withdraw it, your Honor. That is all.

Mr. Anderson: That is all, Mr. Hofheins.

(Witness excused.) [59]

MARVIN D. STEINBACH

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Steinbach, do you have any connection with the defendant Sutherlin Plywood Corporation? A. Yes, sir.

Q. What is your relation to that defendant?

A. I am a member of the board of directors and the secretary.

Q. When were you elected to secretary?

A. In the fall of 1951 when the corporation was first formed.

Q. Have you been the secretary continuously since that time? A. I have been.

Q. When, if ever, did you meet Mr. Robert Hofheins?

(Testimony of Marvin D. Steinbach.)

A. I met Mr. Hofheins, I believe it was November, 1953.

Q. Where did that meeting take place?

A. In Sutherlin at the plant of the Sutherlin Plywood Corporation.

Q. What happened at that meeting?

A. Mr. Hofheins stopped at the plant to look the plant over, and while he was there I was introduced to him, and in the course of the conversations the financial situation of the Sutherlin Plywood Corporation was discussed, and he intimated that he, through his connections, could probably furnish us [60] with working capital which we were endeavoring to raise.

Q. Was a sales contract discussed at that time?

A. No, it was not.

Q. What next happened in the relations between Sutherlin and Oregon Plywood Sales Corporation?

A. At the meeting when Mr. Hofheins was at Sutherlin a subsequent meeting was arranged to be held in Sweet Home at the office of his company there, and at the time agreed upon several of the members of Sutherlin Plywood Corporation's board of directors went to Sweet Home to meet Mr. Hofheins.

Q. What was the date of that meeting?

A. I don't recall. It would be some time——

Q. November or December, 1953?

A. It would be either late November or early December.

Q. What occurred at the Sweet Home meeting?

(Testimony of Marvin D. Steinbach.)

A. We met with Mr. Hofheins, and there was one other gentleman there from his company who was in and out of the room where we were talking, and at that meeting our financial situation was discussed, and Mr. Hofheins took pencil notes of what our conditions were and what we needed, and a subsequent meeting was set for the Eugene Hotel for a later date.

Q. What did you advise Mr. Hofheins and Oregon Plywood Sales Corporation concerning the intention, if any, of Sutherlin to continue operations to produce plywood?

Mr. Yerke: Same objection.

The Court: Answer the question. [61]

The Witness: We informed him that we hoped to keep in operation. That was the idea of forming the company in the first place, was to produce plywood.

Q. (By Mr. Anderson): You advised, did you not, that Sutherlin did continue—did intend to have a continuous operation?

A. I don't recall that we advised him that we would continue operation. We might have said that we hoped to continue.

Q. Do you recall your deposition, Mr. Steinbach, on December 20, 1955—page 12?

(Deposition presented to the witness.)

A. Yes, sir.

Q. Now, Mr. Steinbach——

The Court: How many witnesses of this kind have you got?

(Testimony of Marvin D. Steinbach.)

Mr. Anderson: There are three, I believe.

The Court: I am going to assume that each one is going to say that they intended to continue operation at least 50 months.

Mr. Anderson: Very well, that is what they have said.

The Court: Mr. Steinbach, I want to ask you a question. You said on two occasions that you discussed your financial condition with Mr. Hofheins. What did you tell him?

The Witness: We had the plant in order—I mean practically in position to start production, but we had no financial backing or any working capital, and we needed money to go out and buy veneers and to meet pay rolls, stuff like that; in other [62] words, working capital. The machinery was all in place. The down payments were made on it and contracts made on it and that.

The Court: You did not own the equipment?

The Witness: No, sir, we didn't own all of it. We owned part of it, but we didn't own all of it. It was being purchased on conditional sales contracts.

The Court: In order to get working capital you entered into this contract with Mr. Hofheins?

The Witness: That's right.

The Court: In which you gave them 80 per cent or option to purchase 80 per cent of your output, and you gave a mortgage securing \$80,000?

The Witness: That's right.

(Testimony of Marvin D. Steinbach.)

The Court: Are there any more questions of this witness?

Mr. Anderson: Yes.

Q. Mr. Steinbach, did you consider the contract with Oregon Plywood Sales Corporation profitable for Oregon Plywood Sales Corporation?

Mr. Yerke: We object to that.

The Court: It would not make any difference anyway. What difference would that make, Mr. Anderson?

Mr. Anderson: Well, I don't think it makes too much difference unless he thought it was unprofitable.

The Court: Well, I think they must have thought it was [63] necessary, in any event, to do that. It is a rather severe contract, isn't it, Mr. Anderson, when you give away 80 per cent of your production?

Mr. Anderson: No, your Honor, it is a very ordinary type of contract in the industry.

The Court: You have represented another company that has one of those right here at Milwaukie, Milwaukie Plywood, have you not?

Mr. Anderson: Well, they are quite common. Many of the plywood companies have them. It benefits the company in that they do not have to arrange for the sales, your Honor.

Q. Mr. Steinbach, did Sutherlin perform under this contract?

Mr. Yerke: Objected to as calling for a legal conclusion from a lay witness.

(Testimony of Marvin D. Steinbach.)

Mr. Anderson: I will rephrase the question.

Q. Mr. Steinbach, did Sutherlin commence production? A. They did.

Q. When did that occur?

A. Early January, 1954.

Q. Did Sutherlin receive the loan as agreed in the contract between the parties? A. Yes.

Q. Did Oregon Plywood Sales Corporation finance the purchases of green veneer?

A. Yes. [64]

Q. Did Oregon Plywood Sales Corporation advance 80 per cent of the invoices?

A. That I wouldn't know. I would have to check with the records.

The Court: Is there any dispute about these things?

Mr. Anderson: He has testified on this previously in his deposition that they did make the advance, and I do not think there is any.

The Court: Unless there is going to be some contradiction of your witness' testimony, I do not see any utility in putting on this cumulative evidence. If there is going to be a dispute, will you please let us know?

Mr. Yerke: Yes, your Honor, there will be a dispute as to whether or not they advanced 80 per cent of the invoice amount upon the receipt of invoice as stipulated in the sales agreement. We will show by records they did not upon receipt of the invoice, which is what was required by the agreement.

The Court: When did they do it?

(Testimony of Marvin D. Steinbach.)

Mr. Yerke: I believe that the records indicate that starting with invoice 29 they failed to do that.

The Court: Did they do it at a later time?

Mr. Yerke: There were credits made back and forth at a later time, but most of that occurred, I believe—again I would have to refer to the records—after production had ceased. [65]

The Court: Was it a substantial difference?

Mr. Yerke: I believe at the time there were invoices covering 35 cars where there had not been an advance of 80 per cent of the invoice amount, but I would want to check the records to be sure. We intend to have testimony on that.

The Court: You go right ahead.

Mr. Anderson: All right, your Honor.

Q. Referring to page 15 of the deposition, Mr. Steinbach, on line 19, do you recall my asking you: "What did they do in regard to the advances on the invoices?" And your answer: "They advanced 80 per cent less the cost of financing." Was that your testimony? A. Yes, sir.

Q. Mr. Steinbach, at the time of your shutdown of Sutherlin were any lawsuits pending against Sutherlin Plywood Corporation? A. Yes.

Q. What lawsuits were pending against Sutherlin?

A. There was one for Winkler Machinery Company of Seattle. There was threat of lawsuit by the Federal Government for withholding taxes.

Q. I beg your pardon, did you say a threat or a suit?

(Testimony of Marvin D. Steinbach.)

A. A threat, T-H-R-E-A-T (spelling). [66]

Q. Perhaps you misunderstood the question, Mr. Steinbach. What I am asking is whether at the time you shut down in April there were then pending any lawsuits? Had anybody sued Sutherlin at that time?

A. Oh, no.

Q. Pardon? A. No, sir.

Q. Has anybody sued Sutherlin since that date other than the plaintiff in this case?

A. No, sir; not to my knowledge.

Q. Were all employees of Sutherlin shareholders?

A. With the exception of a few.

Q. How many?

A. Oh, probably three or four.

Q. Mr. Steinbach, what was the opinion of the board of directors in regard to whether they were or were not bound by the contract with the plaintiff?

The Court: What difference would that make?

The Witness: I don't know what the opinion of the complete board would be. I can only answer for myself.

The Court: What difference would it make what these people thought. Isn't that what your client hired you for and that is why Mr. Yerke is here?

Mr. Anderson: Yes, that is true, your Honor. I simply wanted bring out that they considered the contract in force. [67]

Q. Mr. Steinbach, did you consider the sales contract between Sutherlin and the plaintiff in force up until the time of the sale of the mill?

(Testimony of Marvin D. Steinbach.)

A. I beg your pardon, what was the last of that, up until the when?

Q. Up until the sale of the mill.

A. As long as Sutherlin Plywood Corporation was producing plywood, I considered that the sale contract was valid or in force.

Q. I believe that you have said that you also considered it valid as long as Sutherlin owned the plant, is that correct?

A. I don't get what you mean by that.

Q. Well, the point I am asking about is whether or not you considered the contract in force up until at least up until the time you sold the plant to Nordic? A. Yes.

Q. Did you inform Nordic Plywood, Incorporated during the negotiations for the sale that the sales contract was in force? A. We did.

Q. Do you recall a strike in the industry in the summer of 1954?

A. I do now. I didn't when my deposition was taken.

Q. What happened to the plywood market when the strike occurred?

Mr. Yerke: Objected to as incompetent. Mr. Steinbach [68] has not been qualified on that.

Mr. Anderson: He is an officer of the plywood corporation, your Honor.

Mr. Yerke: Mr. Steinbach is a trucker. He is trying to ask him questions as if he were a lawyer.

Mr. Anderson: If he knows. If you know.

The Witness: I don't know.

(Testimony of Marvin D. Steinbach.)

The Court: Is there any question about that? Didn't the price go up during the strike?

Mr. Yerke: I don't know how far it went up, your Honor. I think it did become more firm. It was quite soft in the spring, and the later it did go up appreciably, but I am not sure that that started in June as is claimed.

The Court: I have got the index figures. Mr. Anderson's partner introduced them in another case, and we will give them to you.

Q. (By Mr. Anderson): Mr. Steinbach, was Sutherlin Plywood Corporation ever advised by Nordic Plywood Incorporated that Nordic would not perform the conditions under the sales contract?

A. They informed us that they would not go through with the sale if they had to abide by that.

Q. And the Sutherlin Plywood Corporation knew at the time the sale was made that the contract was being terminated; did they not? [69]

A. I beg your pardon?

Q. Would you read the last question?

(Last question read.)

The Witness: I guess you would call it that.

Q. (By Mr. Anderson): At any rate, you knew that Nordic was not going to give the production to the plaintiff in this case? A. Yes.

Q. At the time the market improved did you give any thought to starting up again?

(No answer.)

The Court: Did you hear the question?

(Testimony of Marvin D. Steinbach.)

The Witness: Yes, sir.

Mr. Yerke: Will you tell him when the market improved or *asked* him to assume when it improved?

Mr. Anderson: I think that is something we have to stipulate on.

The Court: Well, you fix the date.

Mr. Anderson: I will withdraw the question for the time being. You may examine.

Cross Examination

Q. (By Mr. Yerke): How many employees did Sutherlin Plywood Corporation have when it was operating?

A. In the neighborhood of a hundred.

Q. Did you ever examine the ledger and journals of Sutherlin [70] Plywood Corporation?

A. Not extensively; no, sir.

Q. Have you had any bookkeeping experience?

A. No, sir.

Q. Legal training? A. No, sir.

Q. What is your business?

A. I am a trucker.

Mr. Yerke: That is all.

Mr. Anderson: That is all, Mr. Steinbach.

(Witness excused.) [71]

CHARLES M. WOOD

a witness produced in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Wood, do you

(Testimony of Charles M. Wood.)

have any connection with defendant Sutherlin Plywood Corporation? A. I do.

Q. What is that connection?

A. I am the president of the corporation.

Q. How long have you been president?

A. Since the beginning of 1953.

Q. When did you meet Mr. Robert Hofheins?

The Court: Are you going through those same questions?

Mr. Anderson: Well, not all of them, your Honor. I think we can shorten this up.

The Court: I think he must know Mr. Hofheins. What is your business?

The Witness: I am a logger.

The Court: You are a logger.

Q. (By Mr. Anderson): Mr. Wood, were you present at the Sweet Home meeting when this was discussed? A. Yes, I was.

Q. What happened at that meeting?

A. Oh, we discussed the possibilities of receiving finances [72] from Mr. Hofheins' companies and they obtaining some of our production.

Q. What was contemplated by Sutherlin Plywood about continuous production?

The Court: I told you I will assume that all these witnesses will testify the same way that the previous witness did.

Mr. Anderson: Yes, your Honor.

The Court: They hoped to be able to continue for at least 50 months.

(Testimony of Charles M. Wood.)

The Witness: The object was to produce as long as there was a market.

Q. (By Mr. Anderson): Mr. Wood, did Sutherlin receive the loan of \$80,000? A. They did.

Q. Did they receive an 80 per cent advancement on the invoices?

A. Most of the time or sooner or later.

Q. Is your answer then that it did receive the advances? A. Yes.

Q. Did they receive the advances on the green veneer?

A. No, that was paid direct to the company that produced the veneer.

Q. All right, but the plaintiff obtained and purchased the green veneer? [73]

A. As far as we know.

Q. What kind of a manager did Sutherlin have in the spring of 1954?

A. What kind of a manager?

Q. Yes. A. Plywood plant manager.

Q. Well, was he good, bad, or indifferent?

A. Well, he was recommended to us as a very good plywood manager by quite a few people. One of them was Franklin Hofheins.

The Court: That doesn't answer the question. Was he any good?

The Witness: I wouldn't know.

Q. (By Mr. Anderson): Did you feel that he lived up to the recommendations? A. No.

Q. What did you do about it when you found it out?

(Testimony of Charles M. Wood.)

A. We looked around for someone to replace him.

Q. Did you ever replace him? A. No.

Q. Did you have any talk about starting up again after you shut down? A. Certainly.

Q. Was it your intention to start up again?

A. Yes.

Q. Why was it you didn't start up again in September when [74] the market was strong?

A. We didn't have the finances to get into production.

Q. You didn't have the mill either, did you?

A. We certainly did.

Q. Hadn't you sold it in September?

A. Not the first half of it.

Q. But you had—when did you sell it?

A. The contracts are dated—you probably have copies of it.

Q. When did Nordic start production?

A. By the very last of September.

Q. Did the board of Sutherlin consider the contract in force at least up until the sale to Nordic?

A. They probably did.

Q. As a matter of fact, that was the general feeling among the board of directors; was it not?

A. I wouldn't know about the rest of them. There was never a vote taken on it.

Q. Didn't you so testify in your deposition?

A. It's hard to tell.

(Deposition presented to the witness.)

The Court: I will assume that he did, but, Mr.

(Testimony of Charles M. Wood.)

Anderson, I don't know what the contract being in force means.

Mr. Anderson: I do not want to take up the Court's time, but I feel it may have some—— [75]

The Court: I am sure if I do not know what it means exactly that these witnesses probably do not know what it means.

Q. (By Mr. Anderson): Let me ask you this, Mr. Wood: Did the board of directors consider Sutherlin was bound by the contract with the plaintiff at least up until the sale?

A. As long as they were in production.

Q. Or as long as they had the mill?

A. As long as they had the plant. After our production shut down or our plant shut down our production was nothing. 80 per cent of nothing is an awfully small piece of plywood.

Q. As long as you had the plant you were bound to give 80 per cent of the production to Oregon Plywood Sales Corporation? A. That's right.

Q. Now, in the summer of 1954 did you receive some offers to buy the plant? A. We did.

Q. Quite a number of them, weren't there?

A. There was.

Q. Would you tell the Court who you received them from? A. Pacific Plywood.

Q. Aetna Plywood? A. Aetna Plywood.

Q. Colorado Fuel and Iron?

A. No, we didn't. Colorado Fuel and Iron was to finance [76] us to get into production before. Our

(Testimony of Charles M. Wood.)

negotiations with them was to reopen the plant earlier.

Q. Well, in your deposition I believe you said that they made an offer, but you say now it was not an offer from Colorado for this financing?

A. That was financed before, yes.

Q. Did you receive an offer to buy from Campbell and MacLean?

A. We did, and also a firm by the name of Johnson.

Q. Did you receive any other offers?

A. Well, not that I remember right now.

Q. But there were several other people who were interested and discussed the purchase of the mill; isn't that correct?

A. That's right.

Q. In fact, there was quite a lot of interest in acquiring the mill in Sutherlin; was there not?

A. Well, most companies that are in the business are willing to expand at any time.

Q. Did Sutherlin know before the sale that Nordic Plywood, Incorporated was not going to give 80 per cent of production to Oregon Plywood Sales Corporation?

A. They did.

Q. Did Sutherlin Plywood Corporation inform Nordic Plywood of the sales contract?

A. Yes.

Q. Did Sutherlin have any other mill? [77]

A. No.

Q. At the time of the sale did Sutherlin know that there would be no further performance of the sales contract?

A. At the time of the sale?

Q. Yes.

A. Yes.

(Testimony of Charles M. Wood.)

Q. Were orders placed with Sutherlin by Oregon Plywood Sales Corporation after the sale?

A. Yes, which was a very foolish thing to do.

Q. What happened to the orders?

A. Sent them back.

The Court: I do not think there is any dispute about that. You have asked the question of the other witnesses, and it is stipulated in the pre-trial order.

Mr. Anderson: Very well, your Honor. You may examine.

Cross Examination

Q. (By Mr. Yerke): These efforts to purchase the plant by Pacific Plywood, Aetna, and I believe you referred to a man by the name of Johnson, did they come to you, or did you go to them?

A. Both.

Q. Who is Johnson?

A. Well, I don't know his first name. They call him Smoky Johnson. He has a plant down by Grants Pass.

Mr. Yerke: That is all. [78]

The Court: In these offers were you offered as much as \$600,000 for the plant?

The Witness: Yes.

The Court: Why didn't you take those offers rather than the one from Nordic?

The Witness: This one was \$660,000.

The Court: Was Nordic the highest and best offer that you received?

(Testimony of Charles M. Wood.)

The Witness: It was not the highest, but we felt it was the best. Of course, there was so little difference in the price that it might just as well have been the highest.

The Court: That is all.

Mr. Anderson: That is all.

Mr. Yerke: That is all.

(Witness excused.) [79]

CHARLES A. PETHERICH

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Petherich, what relation do you have to the defendant Sutherlin Plywood Corporation?

A. On the board of directors, and I am the treasurer.

Q. How long have you been the treasurer?

A. Since the last — summer of 1953, I believe it was.

Q. Mr. Petherich, do you know of any right that Sutherlin had to terminate its contract with the plaintiff?

A. I believe that's illegal. I wouldn't know myself, no.

Q. Mr. Petherich, did you state on your deposition that you knew of no reason they had to terminate the contract? A. Well——

The Court: I think his answer here today is a

(Testimony of Charles A. Petherich.)

good one. Perhaps this is a witness who would know something about that 80 per cent, the advances made. He was the treasurer of the corporation. What is your business?

The Witness: I am an insurance agent, sir.

The Court: You are an insurance agent?

The Witness: Yes, sir.

The Court: Were you in the plant working full time?

The Witness: No, sir. [80]

The Court: Did you keep all the books and records of the company?

The Witness: No, sir, we had an office manager and bookkeepers to do that.

Mr. Anderson: I have not examined about that 80 per cent. I do not believe he has any knowledge.

Q. Mr. Petherich, did Sutherlin believe when it sold its plant that it was terminating the contract? A. I believe it did.

Mr. Anderson: You may examine.

Mr. Yerke: No questions.

The Court: That is all.

(Witness excused.) [81]

JOHN R. ADAMS

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Adams, do you have some connection with the defendant Nordic Plywood, Incorporated?

(Testimony of John R. Adams.)

A. Yes, I am the president of Nordic.

Q. How long have you been the president?

A. Since its inception.

Q. When did you first hear of the sales contract between Sutherlin and Oregon Plywood Sales Corporation?

A. I don't recall the exact date, but it was on a visit to Sutherlin when I stopped in at the plant down there once.

Q. What time of the year was that?

A. Well, I would say that I am very poor at remembering dates.

Q. Let me put it this way. Did you know about this sales contract all the time during the negotiations for the sale? A. Yes.

Q. Did you have discussions about this sales contract with Sutherlin?

A. Yes, as I recall, we did.

Q. When you purchased the mill did you intend—when I say “you” I mean Nordic Plywood, Incorporated—intend to perform the contract, that is, give Oregon Plywood Sales Corporation [82] 80 per cent of the production?

A. No, we didn't.

Q. Did you know that that contract between Sutherlin and Oregon Plywood Sales Corporation would be terminated if you bought the mill?

A. Well, I wouldn't know what they would do with it.

Q. Didn't you know as a fact that the contract would be terminated if you bought the mill?

(Testimony of John R. Adams.)

A. Well, I would assume that it would. I didn't know that.

Q. But you knew Sutherlin had no other mill; did you not? A. That's right.

Q. Didn't you testify in your deposition that you knew the contract would be terminated when you bought the mill?

The Court: I think the testimony is a word of art. He has already indicated that they had no other plant, and he assumed they would not be able to comply with the contract; isn't that right?

The Witness: Yes.

Mr. Anderson: Very well, your Honor.

Q. Were orders ever presented by Oregon Plywood Sales Corporation to Nordic after it commenced operation of the plant?

Mr. Yerke: They are already in evidence, your Honor. We will stipulate they were received.

Q. (By Mr. Anderson): What happened to the orders which were given to you by Oregon Plywood Sales Corporation?

The Witness: I think they were returned to your law office. [83]

Q. Did you reject them?

A. Yes, we did.

Mr. Anderson: You may examine.

Cross Examination

Q. (By Mr. Yerke): The pre-trial order recites, Mr. Adams, that Nordic Plywood, Incorporated, was organized on September 3, 1954. You re-

(Testimony of John R. Adams.)

call that, don't you? A. Yes.

Q. When did you first start negotiating for the purchase of the assets of Sutherlin?

A. Possibly around July 7th, along in there, I would say, when we actually got down to negotiating.

Q. Was Nordic organized after you had been advised that the assets would be sold to you?

A. Evidently it was. I don't recall the date of their board meeting and when they decided to sell, but we were organized after that time.

Mr. Yerke: That is all.

Mr. Anderson: That is all, Mr. Adams.

The Court: That is all.

(Witness excused.) [84]

NORMAN H. JACOBSON

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Jacobson, what relation, if any, do you have to the defendant Nordic Plywood, Incorporated?

A. I am secretary-treasurer.

Q. How long have you been secretary-treasurer?

A. Since the company was organized.

Q. When did you first hear of the sales contract between Sutherlin and the plaintiff?

A. Sometime after July 7th, I think, between the 7th and the 15th.

(Testimony of Norman H. Jacobson.)

Q. What year? A. 1954.

Q. Were you aware of the sales contract during the negotiations for purchase of the plant?

A. I was.

Q. Mr. Jacobson, you knew, did you not, that the purchase of the plant by Nordic terminated or made it impossible for the sales contract between Sutherlin and the plaintiff to be performed; did you not? A. I suspected that; yes.

Q. Well, you knew that with the plant sold that Sutherlin [85] was disabled from performing; did you not?

A. Well, I did, and I don't think that Nordic Plywood could have operated under a sales contract of that type.

Q. During the negotiations did you discuss this contract with Sutherlin?

A. Not that I recall to any great extent, no.

Q. But it was discussed, was it not?

A. I think it was at the attorney's office, yes.

Q. And as a representative of Nordic, you discussed it with representatives of Sutherlin?

A. I think we did at the attorney's office, yes.

Q. There isn't any doubt about it? It was discussed?

A. Well, we did, yes. I don't recall where—it might have been just informal talk.

Q. But you discussed the fact that you were not going to supply your plywood and that Sutherlin could not at this time supply plywood to the plaintiff? A. That is right.

(Testimony of Norman H. Jacobson.)

Mr. Anderson: You may examine.

Mr. Yerke: No questions.

(Discussion off the record.)

(Witness excused.)

Mr. Anderson: We will produce Mr. Thompson and present him for questioning. You may then cross examine him.

The Court: I want to know what the financial condition [86] of this company was. I want to know what was represented to the plaintiff with reference to the financial condition at the time the contract was entered into. I want to know why the company lost money during the brief period in which it was in operation. I want to know the extent to which Mr. Hofheins was kept informed as to the activities of Sutherlin Plywood Corporation. I also want to know what differences there were in the operations between Nordic Plywood and Sutherlin, the extent to which new equipment has been furnished.

That is about all I can think of, but you do not have to put on six witnesses to prove one point.

Mr. Anderson: We will attempt to restrict it, your Honor.

(Thereupon, the evening recess was taken.)

Portland, Oregon, Wednesday, March 28, 1956, at 10:00 a.m., Court reconvened, pursuant to adjournment, and proceedings herein were resumed as follows:

The Court: All right, Mr. Anderson.

Mr. Anderson: Your Honor, the parties have conferred regarding an open account, and we have reduced some of the items, but we still have a conflict on a couple of items.

The Court: What are the items?

Mr. Anderson: And I wanted to advise the Court. One is in regard to whether or not certain assignments of accounts were taken in payment or as security. We are willing to confer later in the day and try to arrive at some decision on those, but I don't believe we can get together on that item since we have conflicting facts as to whether the assignments of accounts were in payment or security. We are prepared to put in testimony on that point.

But if that is to be an issue, and it appears that it will be—I gathered from Mr. McClanahan this morning that he will not concede that the accounts were given as security but contends that they were given as payment.

The Court: All right. Put on your case, then.

Mr. Anderson: I want to advise the Court that if the Court still wants authorities on the point about the admissibility [88] of the negotiations of the parties, I have authorities which I mentioned yesterday.

The Court: What do the cases hold?

Mr. Anderson: The cases hold, your Honor, that in order to properly construe a contract in this type of case the negotiations are admissible.

The Court: You mean where there is no ambiguity?

Mr. Anderson: If there was absolute unambiguity, your Honor, then probably not. But if there is a question of construction in view of the recitals evidence of negotiations may be admitted—not to vary the language but to assist in the proper construction of the language.

The Court: All right. Give me the cases.

Mr. Anderson: Great Lakes & Salt Lake Transportation Company vs. Scranton Coal Company, in 239 Federal Reporter at page 608, which cites United States vs. Bethlehem Steel Company, 205 U. S. 105.

The Court: What other cases?

Mr. Anderson: Those are the only two cases I mentioned on that point, your Honor.

The Court: All right.

Mr. Anderson: I do want to call to the Court's attention one other authority which we will rely upon in regard to the breach of the contract and the interference, a case decided in this court by Judge Fee, McKenney vs. Buffelen Manufacturing [89] Company, Civil No. 6198.

The Court: Is that one that was just affirmed by the Court of Appeals?

Mr. Anderson: Affirmed by the Court of Appeals as modified as to amount but not as to liability on February 29th, 1956.

The Court: I have been reading it just recently.

Mr. Anderson: The appellate decision does not discuss this particular point in great detail, but it

does affirm and says that the contrary contention is without merit.

Mr. Yerke: I am not familiar with that case. Was the seller there in financial difficulties as here?

The Court: That was a case involving Errion, who was one of the leading defrauders in this area. I don't think any such claim is being made here. He has fraud judgments from here to Seattle and Tacoma, to Spokane and various other places.

Mr. Anderson: Your Honor, the man Errion was involved in that and, as the Court said, he was the one that led them to the point of no return. But he was not a party in that case. This case rested upon what the defendants did; not what Errion did.

The Court: Go ahead and put on your case. [90]

HENRY L. THOMPSON

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Thompson, what is your relation to the plaintiff, Oregon Plywood Sales Corporation?

A. I am Assistant Sales Manager of that corporation.

Q. Are you familiar with the market conditions in the plywood industry and have you been so familiar since January 1, 1954?

A. From January 1, 1954?

Q. Yes. A. Yes, I am.

(Testimony of Henry L. Thompson.)

Q. What was the status of the plywood market in the spring of 1954?

A. In January of 1954 it was a market of about \$85 list. In the spring of '54 it started to weaken, the tail end of January of '54 the market weakened in price, and it went back and forth from a \$80 list to a \$76 list. By that I mean quarter inch AD prices. Those prices, in my recollection, stayed until the strike occurred in the industry about the middle of June, 1954. Of course, the mills that were operating at that time were immediately—went up in price, and it was profitable for them. The price went up to \$85 and sometimes as high as \$90 to \$95. [91]

Q. Now Mr. Thompson, what has been the status of the plywood market since the spring of '54?

A. I would say that the plywood market has been very good since the strike.

Q. Mr. Thompson, what kind of orders did Oregon Plywood Sales Corporation place with the defendant Sutherlin?

A. We placed orders with Sutherlin as they asked for them, the type of orders that they asked for we tried to give them.

Q. Could Oregon Plywood Sales Corporation have placed at least \$100,000 per month of orders with Sutherlin during the period from the time they shut down up until the strike started?

A. I am sure that we could. We could have placed \$100,000.

Q. Did you have orders available?

(Testimony of Henry L. Thompson.)

A. We had orders available.

Q. To fill those orders?

A. During all that period; that is right.

Q. What amount of orders could you have placed with Sutherlin after the strike commenced?

A. Well, I would say we could have placed three times that amount if they could have handled them, because we had a freeze of orders and we had a heavy order file that we could have placed.

Q. Could you have placed at least \$200,000 per month with Sutherlin after the strike started?

A. Yes, I am sure we could. [92]

Q. For how many months would that have continued?

A. We could have continued right up until the present time?

Q. Are you prepared to place orders today?

A. I could place orders today. We would be glad to and could place orders up to 20 or 30 cars right today.

Mr. Anderson: You may examine.

Cross Examination

Q. (By Mr. Yerke): How many orders did you place with Sutherlin in January of 1954? What was the dollar amount?

A. The dollar amount—I can't offhand tell you that, but I do know that from the time that this agreement was set, which was the latter part of December, up until the early part of January my recollection is that I placed about 20 or 25 orders

(Testimony of Henry L. Thompson.)

for sheeting in grades that they wanted to start their mill. My recollection is also that about the middle of January or the early part of January that we received a wire that the orders were coming too fast; slow up.

Q. When did you place the first 25 orders?

A. They were placed in the latter part of December and the early part of January.

Q. Isn't it a fact that the first orders you placed were on December 31st, 1953, and you wrote out the orders in longhand?

A. I wrote some orders out in longhand. [93]

Q. The orders that were placed were orders that were placed by Oregon Plywood Sales Corporation; isn't that right?

A. They were placed by Oregon Plywood Sales Corporation.

Q. They were not in response to orders or suggested orders from Sutherlin Plywood Corporation?

A. Oh, yes, they were. They were suggested orders and in the specifications that they wanted to start their mill up.

The Court: That wouldn't make any difference. Find out about what happened at the time the plant shut down, how many orders were unfilled.

Q. (By Mr. Yerke): How many orders did you have on hand at the time the plant shut down on April 21st, 1954?

A. Well, we had a number of orders, of course, in the office that we had not placed with them be-

(Testimony of Henry L. Thompson.)

cause they refused to take any more orders. They had nothing to make them with. And we also had about seven or eight orders—nine orders, I believe, roughly—that they still had unfilled.

Q. In other words, to answer the question, they had seven or eight or nine orders unfilled at the time they shut down?

A. They had refused orders prior to that.

Q. They had refused orders? A. Yes.

Q. Who had refused orders?

A. Because they didn't have any veneer or glue to make them with. [94]

Q. They didn't have any glue or veneer to make them? A. That is right.

Q. That is the reason they refused the orders?

A. They refused some orders at that time.

Q. Did you maintain a 30-day order file with them during the period they were operating?

A. To our best ability we did, but with the different stoppages on orders I don't know whether we had a 30-day order file or not. It was pretty hard to determine upon a 30-day order file the way things were running.

The Court: This stoppage, I don't understand what you mean by "stoppage."

Q. (By Mr. Yerke): Let me ask you: What do you mean by "stoppage"?

A. Where they stopped us from sending orders at different times.

Q. Let's take the period through March of 1954.

(Testimony of Henry L. Thompson.)

Did you maintain a 30-day order file up through that particular period?

A. May I ask this question just before answering? At that period of time what was a 30-day order file?

Q. What does that mean to you as a man that is in the plywood market?

A. According to their schedule of anticipated production, which I assumed was somewhere around 2,000,000 feet, supposedly, but they could be high on it, on their production I would say yes, we had a 30-day order file most of the time. [95]

Q. What does a 30-day order file mean to you as a plywood man?

A. What does that mean? Well, that means 30 days of production in that mill.

Q. In other words, you would have on hand orders which would cover their production for the next 30 days?

A. Cover production for 30 days, yes.

Q. Is it your testimony that for the months of January, February and March of 1954 you had on hand with Sutherlin Plywood Corporation orders which were sufficient to cover their production for the next 30 days at all times; is that your testimony?

A. That is my understanding. We gave them orders as they wanted them.

Q. Is that your recollection based upon the orders that you gave them at that time?

A. That is my recollection.

(Testimony of Henry L. Thompson.)

Q. You are the person who gave the orders to them, are you not?

A. I am the one that ordered them——

The Court: Mr. Yerke, I was wondering when you brought it up yesterday and again today what the relevancy of the 30-day order provision is. Are you contending that that is the basis for the plant closing, that they didn't have the 30-day order file?

Mr. Yerke: It was not the reason for the plant [96] closing necessarily, your Honor, but it is our position here that if this is an enforceable agreement there were breaches or there was a failure of consideration on the part of the plaintiff prior to the time that this asserted breach on our part occurred.

The Court: That is just grabbing at straws, isn't it, this particular line of attack? It seems to me we ought to try the case on the main issue.

Mr. Yerke: All right. That is all, Mr. Thompson.

Redirect Examination

Q. (By Mr. Anderson): Mr. Thompson, did you after the mill shut down make attempts to place orders on the same terms with other mills?

A. Yes, I did.

Q. Did you make a number of those attempts?

A. Why, I would say many, many attempts. I called on the West Coast for days and days, every day, trying to get——

The Court: What do you mean on the same terms, 5 per cent off the list price?

(Testimony of Henry L. Thompson.)

Mr. Anderson: That is what I meant.

The Witness: Of course I tried to, but I wasn't successful.

The Court: Of course, nobody was selling during the strike, were they? Anybody who was producing plywood could sell it without any difficulty?

A. Well, somebody had to sell it. [97]

The Court: It was just a matter of accepting orders at that time, wasn't it?

A. And trying to fill them.

The Court: All right. He doesn't have to prove that. You don't have to go any further.

Mr. Anderson: I have a long list of calls that he made——

The Court: Oh, there is no use of that. It is pretty obvious that if he had orders he was trying to fill those orders.

Mr. Anderson: All right.

The Court: I don't think there is any question that he found it difficult, if not impossible, to fill those orders elsewhere at the same price that Sutherland had been filling them.

Mr. Yerke: That is the extra 5 per cent there we want, your Honor.

Mr. Anderson: That is all, Mr. Thompson.

(Witness excused.) [98]

F. W. VanHORN

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

(Testimony of F. W. VanHorn.)

Direct Examination

Q. (By Mr. Anderson): What is your occupation, Mr. VanHorn?

A. I am Manager of the Linnton Plywood Association.

Q. What is your experience in the plywood industry?

A. I have worked in the plywood industry since 1941.

Q. What jobs have you had?

A. I started as a timekeeper and personnel man and worked as office manager.

The Court: What are you trying to qualify him as?

Mr. Anderson: Just his familiarity with the industry, your Honor.

The Court: For what purpose?

Mr. Anderson: It has no particular bearing on what we are going into. I will delete that question.

Q. Mr. VanHorn, are you familiar with contracts in the plywood industry granting the right to purchase a percentage of the output to a purchaser?

A. Yes.

Q. What are the common terms of discount in such a contract?

Mr. Yerke: Objected to as irrelevant and immaterial.

Mr. Anderson: I think the Court made some [99] comment yesterday about this contract, and I simply——

The Court: Linnton Plywood went into court to upset their agreement. Didn't you have a contract

(Testimony of F. W. VanHorn.)

that was so oppressive you came in and had it set aside?

A. That was a complete management contract, sir.

The Court: And it was also 5 per cent for the sales, wasn't it?

A. Ten per cent for the sales.

The Court: Ten per cent for the sales?

Mr. Anderson: The only thing I want to show is that this is the usual and ordinary type of contract, as I represented.

Mr. Yerke: We are concerned here, of course, with just one contract, your Honor, and what the practice might be between other corporations, firms or organizations certainly would have no bearing upon this. We are concerned with the construction of this particular agreement.

Mr. Anderson: As long as there is no contention that this contract is not oppressive——

The Court: I have seen other 5 per cent contracts. Malarkey has a 5 per cent contract or did.

Mr. Anderson: I am prepared to ask the witness about a number of them, your Honor, of which he has knowledge if there is any issue on it. I really don't think there can be.

Mr. Yerke: We haven't contended that the agreement was oppressive as a matter of defense. [100]

Mr. Anderson: All right.

Mr. Yerke: It may be oppressive, but I don't see that that particularly has any bearing on the

(Testimony of F. W. VanHorn.)

issues here. It undoubtedly was oppressive to some extent.

The Court: I am going to assume that that is not in issue.

Mr. Anderson: All right. Thank you, Mr. VanHorn.

(Witness excused.)

The Court: Over a period of time I learned something about the plywood industry. They all come in court at one time or another.

What about this claim that the assignments of the accounts were given in satisfaction as opposed to security?

Mr. Anderson: That is the next matter, your Honor. [101]

ROBERT HOFHEINS

was recalled as a witness in behalf of the Plaintiff and, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Hofheins, do you recall an occasion in the spring of 1954 when certain accounts were assigned to you by defendant Sutherlin? A. Yes, sir.

Q. What were the circumstances surrounding the assignment?

A. There were two assignments or agreements. One covered an advance of \$11,000 which Oregon Plywood Sales Corporation made to Sutherlin for payroll purposes, and in that one they assigned

(Testimony of Robert Hofheins.)

an invoice or invoices from Western Door & Plywood Corporation in the amount of \$8,461.72.

Q. As I understand it, those were paid?

A. That was paid, but that was a collateral assignment.

Q. Now the next one.

A. Then on April 28th Sutherlin owed Oregon Plywood Corporation substantial amounts of money for veneer which had been shipped out in the form of plywood and for which they had never paid us, although according to the contract they were supposed to pay us at the time the shipment was made. But they represented to me that they didn't have the funds available to pay us when I contacted them, so they offered to me an assignment as [102] collateral or as security for the funds which they owed Oregon Plywood Corporation for the veneer. That assignment was signed by Mr. Steinbach as secretary, and at the time I took that assignment from him I specifically stated that our acceptance of it would be subject to Mr. Swan's approval, and it was definitely understood——

The Court: Who is Mr. Swan?

A. Mr. Swan was Secretary of Oregon Plywood Corporation, sir. And I definitely stated at that time it was my understanding that this would be a collateral or security assignment in lieu of the money that they owed us until such time as we might be able to collect these accounts.

Q. (By Mr. Anderson): Did I hear you correctly that this latter assignment was an account of

(Testimony of Robert Hofheins.)

the Coastal Lumber Company, or is that something else? A. Coastal Lumber Company?

Q. What assignment were you talking about just now?

A. This last one of April 28th, the assignment of April 28th, included two invoices to Coastal Lumber Company, one for a car shipped April 16th and one for a car shipped April 19th.

Q. Is that the one you have just described?

A. That was the last one; yes, sir.

Q. Which you claim was an assignment as collateral? A. Yes, sir.

Q. Were you familiar with the Coastal Lumber Company? [103]

A. We had had some communications with them; yes, sir.

Q. Did you know anything about their credit at that time?

A. Well, I will say this: that we would not sell them except on a sight-draft basis or on the basis of a 10 per cent deposit on the order and the balance sight draft because of their prior record and the record of the principals in the organization.

The Court: Was that one of the orders that you had sold or was that one of the orders that came directly?

A. That was one of the orders that they sold, sir, and shipped out the veneer on it without reimbursing us for it.

Q. (By Mr. Anderson): Did you ever accept that assignment as payment?

(Testimony of Robert Hofheins.)

A. No, sir. No, sir. Later on they sent us a statement which purported to show this as payment, and I immediately wrote them and called their attention to the fact that this was merely a collateral or security assignment.

The Court: How much of that was paid?

A. All but the Coastal Lumber Company, sir, and we received \$205 on the Coastal Lumber Company and there is a judgment against Coastal at the present time, but we are unable to locate the principal for examination. He has left and they don't know where he is.

The Court: How much is due on that invoice?

A. About slightly over \$6,000, I believe, sir.

The Court: How much are you claiming is due [104] on the account?

Mr. Anderson: The balance of the account I claim is a little over \$3,000. This is the principal item.

The Court: I thought there was another claim for damages.

Mr. Anderson: There are some minor claims, yes, your Honor, which I want to take up now.

The Court: All right. Go ahead.

Q. (By Mr. Anderson): Mr. Hofheins, in the statement which you prepared, the summary of plaintiff's open account claim, we have an item of \$1,556.80, which is shown as "Loss of cars accepted and not shipped by Sutherlin." A. Yes, sir.

Q. What does that represent?

A. Those represent orders which we had sold

(Testimony of Robert Hofheins.)

for them and which we had placed with them and on which we had their acknowledgment, and at the time they closed down they returned those two orders to us and said they would not be able to fulfill them. And of course we were obligated to the customer, so we had to go out and buy them to the best possible advantage and ship them. And that is our actual loss in the matter for those orders which had been accepted by Sutherlin.

Mr. Yerke: I move to strike that line of testimony, your Honor, on the ground that it relates to an unliquidated damage claim, whereas Mr. Anderson's claim here is purportedly on the basis of an open account. [105]

Mr. Anderson: An open account can be unliquidated, your Honor, but it is liquidated as far as we are concerned. We incurred the expense. There isn't any doubt in our minds about the amount.

The Court: I have some doubt about it, but I will let it go. I don't understand why the account is only about \$3,000 if he sustained a loss of \$6,000 on the shipment. Do you mean that Oregon Plywood Sales collected almost all of that from these other invoices?

Mr. Anderson: As far as the green veneer purchased, the \$214,000 and the \$160,000-odd figure we are together on. I believe that is correct. We are substantially together on those items; is that right?

Mr. Yerke: We are together on the gross amount of the green veneer purchased, which would be the

(Testimony of Robert Hofheins.)

figure of \$216,000. The amount of the discounts may be open to some dispute.

Mr. Anderson: I believe that we settled that this morning. In any event, these are additional items, your Honor. I don't believe there is going to be any difference between us on these big items. These are several small items. They contend we owe them a few thousand dollars and we contend they owe us a few thousand.

The Court: All right. I am going to let you put in your testimony.

Q. (By Mr. Anderson): Mr. Hofheins, you have [106] an item in the summary called "Expenses for Car 66555 in the amount of \$336."

A. Yes, sir.

Q. What do you claim on that item?

A. That was an order which was accepted by Sutherlin, and the order was shipped. It was for material which was to be oiled and edge-sealed, and when the car arrived at destination it was discovered that an error had been made and that the car that had been shipped was not oiled and edge-sealed.

The Court: Oiled and sealed?

A. Oiled and edge-sealed.

The Court: Oiled and edge-sealed.

A. Yes, used for concrete purposes.

The Court: I never heard of that. Tell me what that is.

A. Well, on concrete form panels they oil the

(Testimony of Robert Hofheins.)

surface of it so that when they strip the forms off from the——

The Court: It won't stick?

A. It won't stick; that is right. And the edge sealing is for the purpose of preventing the moisture, which is natural in concrete, from getting into the panel and possibly deteriorating the glue.

The Court: You had to divert the car to someone else?

A. No, the customer took the car, and then he went ahead and oiled and edge-sealed it, and these are the actual cash out of pocket expenses that we paid him. Actually, the claim was for \$436, and we told him that that was a little unreasonable [107] because he showed some overtime for labor, and as a result we got the claim reduced \$100.

The Court: Is there any dispute about that claim? Did you pay Sutherlin more for this——

A. Oil sealing?

The Court: Yes.

A. Yes, sir.

The Court: You had already paid it?

A. We had already paid them for oiling and edge sealing. It was a production error, you might say, a shipping error.

The Court: What about that?

Mr. Yerke: We are disputing it, your Honor. It is our position it is unliquidated. Sutherlin didn't have the facilities to make that type of veneer. And our records, as I understand it, do not disclose this letter which he has referred to in the

(Testimony of Robert Hofheins.)

reply, the letter of September 10th, 1954, so consequently we do feel we have to dispute that.

The Court: All right.

Mr. Anderson: The letter is in the exhibit.

Mr. Yerke: The point I am making is we have no record it was received, Mr. Anderson. It may have been. I can't say.

Q. (By Mr. Anderson): Did you send a letter to Sutherlin on or about September 10th, 1954?

A. Yes, sir.

Q. What was the substance of the letter? [108]

Mr. Yerke: We object to that.

The Court: Do you have the letter?

Mr. Anderson: The letter is in.

The Court: You don't have to tell us what is in it. You don't have to describe a letter that is in evidence.

Mr. Anderson: All right. On the other items we still have a good chance to get together, on the rest of them.

The Court: What about the \$860 item?

Mr. Anderson: That is deleted, your Honor. That shouldn't have been in there. That is not in the total figure. We agreed several days ago in consultation with opposing counsel to delete that.

The Court: Fine.

Mr. Anderson: I would like to reserve the opportunity to put on further testimony if we don't get together during the noon recess on the balance.

The Court: All right. You can do that. Any cross examination?

(Testimony of Robert Hofheins.)

Mr. Anderson: There is another item I would like to ask about.

The Court: All right. Go ahead.

Q. (By Mr. Anderson): Mr. Hofheins, would you explain how you originally charged Sutherlin for the green veneer purchased.

A. Yes, sir. At the time the cars were shipped and the invoices were received there was a formula [109] set up whereby we were to deduct so much per thousand square feet of plywood, $\frac{3}{8}$ rough basis for the veneer that was in those cars, and to reimburse Oregon Plywood Corporation for the money they had paid out for this veneer. The original figure based on the base estimates that we could get was \$44 per thousand, $\frac{3}{8}$ rough basis. At the time the inventories were made for the February 28th date it was discovered that they had been using more veneer than that original \$44 contemplated, and that the \$44 was not covering the amount of veneer which had actually been shipped as evidenced by the amount that they still had on hand. So that figure was raised to \$51 on a $\frac{3}{8}$ rough basis. And about the middle of March I wrote them a letter calling attention to the fact that as of the end of February they owed us somewhere in the neighborhood of \$28,000 for veneer which had previously been shipped and for which a deduction had not been made. And we asked them for the check for that \$28,000 at that time.

The Court: What is the purpose of this testimony?

(Testimony of Robert Hofheins.)

Mr. Anderson: Your Honor, there is a contention that we did not advance 80 per cent of the invoices. What happened was that they got behind on the veneer payments, and not enough money was deducted originally from the veneer payments because the price was higher. Then when they were unable to make up the difference as the contract required it was necessary to credit future invoices. That is the explanation for their claim. [110]

The Court: I am going to tell you something, Mr. Anderson. I am really not concerned about these minor issues.

Mr. Anderson: All right, your Honor.

The Court: Because that is not the basis upon which the plant closed. I am interested in the principal issues, as I told you before. Let's stop reaching for straws.

Mr. Anderson: Yes, sir. You may examine.

Cross Examination

Q. (By Mr. Yerke): Now the second assignment that you referred to, Mr. Hofheins, I believe you testified was executed on April 28th, 1954; is that correct?

A. It carries that date, sir.

Q. Does that accord with your recollection, that it was on or about that date?

A. Well, I believe that it probably was. That is the date of it; yes, sir.

Q. Where was that executed?

(Testimony of Robert Hofheins.)

A. I believe that was executed at Sutherlin, Oregon, sir.

Q. Was it executed in your presence?

A. I believe that Mr. Steinbach did sign it in my presence.

Q. Who else was present besides you and Mr. Steinbach? A. I don't recall. [111]

Q. Now, following the execution of that assignment, or the accounts referred to in the assignment, did you make attempts to collect those particular accounts? A. Yes, sir.

Q. Did you make attempts to collect the accounts that were assigned to Western Door & Plywood Company? A. Yes, sir.

Q. And did you extend credit to Western Door & Plywood Company on those accounts?

A. Well, I wouldn't know whether we extended credit or not on those particular accounts. They sent us some notes when they couldn't pay, and then they paid off their notes.

Q. But on these particular accounts did you have discussions concerning the delay in payment whereby you authorized a delay?

A. With Western Door?

Q. Yes.

A. I don't believe we ever authorized a delay, no, sir.

Q. Do you recall ever advising Mr. E. C. Cunningham, Chairman of the Board of Directors of Sutherlin Plywood, that you had extended the time of those particular invoices?

(Testimony of Robert Hofheins.)

A. No, I recall advising Mr. Sutherlin that——

Q. You mean Mr. Cunningham?

A. I mean Mr. Cunningham—that we had not been able to collect them. But I don't recall that we ever extended any additional payments. We did [112] take notes to close it, and the notes were paid off. Now whether that is an extension of time or not I wouldn't know.

Q. Isn't it a fact that those notes related instead to the Western Door invoices assigned by the assignment of April 5th, 1954?

A. I don't believe so, sir. Those April 5th invoices I think were paid up, but I think these were the ones that were hanging fire, so to speak, and it took us a while before the notes were paid off.

Mr. Yerke: That is all.

Mr. Anderson: One other question, if I may, your Honor, regarding damages.

Redirect Examination

Q. (By Mr. Anderson): Mr. Hofheins, have you prepared a summary of the profit and loss to Oregon Plywood Sales Corporation during the period that you got production from Sutherlin?

A. Yes. our bookkeeper prepared one.

Mr. Anderson: May we have that marked.

(The summary of profit and loss of Oregon Plywood Sales Corporation above referred to was marked by the Clerk Plaintiff's Exhibit 29 for identification.)

Q. (By Mr. Anderson): Mr. Hofheins, refer-

(Testimony of Robert Hofheins.)

ring to the document [113] which you mentioned, which is Exhibit 29 for identification, what does that show as the net result of that summary?

Mr. Yerke: Objected to as incompetent, irrelevant and immaterial. The exhibit would not bear on the measure of damages claimed by plaintiff in this case, which is 5 per cent mill value; and also on the further ground that no foundation has been laid for the answer by the witness.

The Court: I don't think that the profit and loss of the plaintiff corporation is of any probative value in this case for the reason that this was apparently a new enterprise for this company. That is, they had just taken on Sutherlin and they were going into a new field.

Mr. Anderson: What I intended to show, your Honor, was a comparative statement as to what the profit would have been if they had not had the production from Sutherlin. It is only for the five months. I agree with Mr. Yerke that the measure of damages is 5 per cent——

Mr. Yerke: I didn't say the measure of damages was 5 per cent. I said that is the measure you are claiming.

The Court: Yes. It is 5 per cent less expenses.

Mr. Anderson: Yes, that is right. That is offered simply as some corroboration and as some background, if the Court desires it.

The Court: To show that during the time that they did sell the plywood for Sutherlin they made more money? [114]

(Testimony of Robert Hofheins.)

Mr. Anderson: Yes.

The Court: I would just assume that. You don't have to prove that. I will accept the exhibit. The exhibit may be admitted. I am going to take it under advisement.

Mr. Anderson: Here is a supplemental exhibit that I would like to have marked as Exhibit 30.

(The summary of profit and loss statement above referred to, together with supplemental statement, were marked by the Clerk Plaintiff's Exhibits 29 and 30, respectively.)

Mr. Anderson: You may examine.

Mr. Yerke: No further questions.

(Witness excused.)

Mr. Anderson: Your Honor, subject to the damage feature which we hope to get together on during the noon hour, that is the plaintiff's case.

The Court: All right.

Mr. Yerke: We have some exhibits to offer, your Honor, which may simplify this if Mr. Anderson has no objection, and we won't have to call some of the witnesses as to the matters involved.

The Court: All right.

Mr. Yerke: We offer in evidence at this time Defendants' Exhibit 116, being the assignment of April 28, 1954. [115]

The Court: Is that an outright assignment?

Mr. Yerke: It so states on its face, your Honor, yes.

The Court: All right; go ahead.

Mr. Yerke: Is there any objection, Mr. Anderson?

The Court: No, no.

Mr. Anderson: No.

(The assignment dated April 28, 1954, above referred to, was received in evidence as Defendants' Exhibit 116.)

Mr. Yerke: We also offer at this time Defendants' Exhibits 117 and 117-A, being the memorandum agreement and assignment of April 5th, 1954, which Mr. Hofheins also testified to.

The Court: All right. It may be admitted.

(The memorandum agreement and assignment above referred to were received in evidence as Defendants' Exhibits 117 and 117-A, respectively.)

Mr. Yerke: We also offer in evidence at this time Defendants' Exhibit 118, being a notice to creditors of Sutherlin Plywood Corporation, together with return receipts signed by T. D. Sadoff of Oregon Plywood Corporation and Henry L. Thompson on behalf of Oregon Plywood Sales Corporation. This bears on the matter of notice which Mr. Hofheins testified about yesterday.

Mr. Anderson: I object to that, your Honor, for [116] the reason I see no relevancy to that document. It is Oregon Plywood Corporation and not the plaintiff. Although that is not particularly important, I see no relevancy to it.

Mr. Yerke: It was sent to both of them, your Honor. We have two cards here signed by a repre-

sentative of each, one at Sweet Home and the other at the Buffalo office.

The Court: All right. It may be admitted.

Mr. Anderson: I do object to the relevancy, your Honor. I see no relevancy or materiality to this notice of creditors on August 24th.

The Court: Mr. Hofheins said he never knew that the sale was going to be made until after the sales order was actually consummated.

Mr. Yerke: In September and October, he testified yesterday.

Mr. Anderson: I object to it.

The Court: Objection overruled.

(The notice to creditors above referred to was received in evidence as Defendant's Exhibit 118.)

The Court: Just give the numbers now.

Mr. Yerke: We offer Exhibit 120.

The Court: All right. Give the rest of them.

Mr. Yerke: Exhibit 121.

The Court: All right. The next one. [117]

Mr. Yerke: Exhibit 122, Exhibit 123, Exhibit 124, Exhibit 125, Exhibit 126, Exhibit 128-A, Exhibit 129-A——

The Court: Those are not marked. You just have 128 and 129 marked in the pretrial order. Is there a difference between them?

Mr. Yerke: They cover the same general subject, but we thought we would try to identify them. We are not offering everything in order to simplify the record.

The Court: All right.

Mr. Yerke: Exhibits 129-B, 129-C, 129-D, 129-E, 129-F, 130, 131, 132, 134-A, 134-B, 134-C, 134-D, 134-E, 134-F, 134-G, 134-H, 134-I, 136, 137, 138, 139, 140, 142-A, 142-B, 143, 145, 146, 149——

The Court: You haven't got 149. What is 149?

Mr. Yerke: Excuse me, your Honor. 149 would be a letter from Koerner, Young, McCulloch & Dezendorf to Nordic Plywood, Inc., dated October 18, 1954.

The Court: All right.

Mr. Yerke: Exhibit 150 would be a letter from Koerner, Young, McCulloch & Dezendorf to Nordic Plywood, dated October 19, 1954.

Exhibit 154 is a reconciliation of plaintiff's summary of open account to defendants' Exhibit 143.

We also offer at this time, your Honor, the journal of Sutherlin Plywood Corporation, being Exhibit 132-A. That [118] would be covered under accounting records. And we offer the ledger of the same corporation, being Exhibit 132-B.

The Court: All right. To which of these exhibits does the plaintiff object?

Mr. Anderson: If the Court please, I have not had an opportunity to examine part of them, principally the correspondence and letters. I have seen a number of the other documents.

The Court: Just go ahead and start and tell me which ones you object to.

Mr. Anderson: The first would be 128-A, your Honor, and 129-A through 129-F. We don't know what that involves.

Mr. Yerke: I am advised you have already ex-

amined those, Mr. Anderson, with Mr. Cunningham. They were made available to you about a week ago. All of those are either letters from Robert Hofheins or Franklin Hofheins. They are original letters. They may have already been offered by Mr. Anderson. I am not sure. I haven't checked the correspondence file.

The Court: He will have an opportunity to look at them.

Mr. Anderson: 132-A and 132-B I have not seen. I object to them until I have examined them.

136 and 137 and 138—I have not seen 136 and 137. I object to 138 as a letter from a lawyer to the defendant Sutherlin. I don't think it is relevant.

The Court: Isn't it relevant on the basis that the defendant contends that the sale of the plant [119] was based upon necessity and not because of any attempt to avoid fulfilling the contract; that it was a good faith transaction?

Mr. Yerke: Excuse me. I might state this and maybe it will clear it up, perhaps. We are not offering the letters, such as Exhibit 138, on the issue as to whether or not they had the right to sell, but we are offering it on the issue of their good faith. They did consult a number of lawyers to determine whether or not it would be proper for them to go ahead and sell. Only after having done that did they go ahead and make the sale. We are not offering the letter containing advice on the grounds that the advice is correct, but only on the issue of

good faith. They have alleged that we acted in bad faith.

The Court: I am going to admit 138.

Mr. Anderson: I wonder if I might ask that the letters from the other lawyers be produced. I understand the other opinions are contrary.

Mr. Yerke: I don't believe that has any foundation in fact, Mr. Anderson.

Mr. Anderson: That was the testimony on deposition. We will bring that out, then.

The Court: What numbers are they?

Mr. Anderson: They are not here. I just asked for them to produce the other letters.

Mr. Yerke: We will produce any and all opinions we have. [120] We have no reason to withhold anything.

Mr. Anderson: Exhibit 142-B, correspondence between James C. Dezendorf and George Luoma. It is my understanding that that relates to the payoff on the mortgage. There was a difference of \$236, but I feel that is now resolved.

The Court: If it doesn't refer to settlement negotiations don't you think it is admissible?

Mr. Anderson: If they still contend they are entitled to the \$236 it would have some bearing on it, yes.

The Court: All right. We will have that checked a little later. Go ahead.

Mr. Anderson: Those are the only objections, your Honor.

The Court: All right. At this time, all of the exhibits offered by Mr. Yerke, with the exception

of 128, 129, 132, 136, 137 and 142 are admitted. As to the exhibits the numbers of which I just read off I will take those under advisement. I am taking those under advisement to give you an opportunity to examine them during the recess at the noon hour. Will you let me know whether you withdraw your objections? If you don't withdraw them then I will pass upon the admissibility.

Mr. Anderson: Yes, sir.

The Court: All right.

(The documents above referred to, having been previously marked as Defendants' Exhibits 120, 121, 122, 123, 124, 125, [121] 126, 130, 131, 132, 134-A, 134-B, 134-C, 134-D, 134-E, 134-F, 134-G, 134-H, 134-I, 138, 139, 140, 143, 145, 146, 149 and 150, were received in evidence.)

HAROLD HAMBY

was produced as a witness in behalf of the Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Where do you reside, Mr. Hamby? A. In Wheeler, Oregon.

Q. By whom are you presently employed?

A. By the State of Oregon.

Q. In what capacity?

A. In the State Unemployment Compensation Commission.

Q. Have you ever been a stockholder of the defendant Sutherlin Plywood Corporation?

(Testimony of Harold Hamby.)

A. I have.

Q. How much stock did you own in that corporation?

A. I have one working share of \$2,000 and \$40 of regular stock.

Q. Have you ever been an officer or director of that corporation? A. No.

Q. Were you ever employed by that corporation? [122] A. I was.

Q. In what capacity?

A. As office manager.

Q. During what period of time?

A. From July, 1953, to June, 1954.

Q. What were your duties as office manager, generally speaking?

A. To see that the proper records were kept and the functions of the office carried on.

Q. Did you have any duties as far as the accounting procedures were concerned?

A. I supervised them.

Q. Who actually did the accounting?

A. They were done by Grant Ayot, who in turn worked under Ray Ward, who was a CPA with Goodnight & Ward, who set the books up.

Q. Did Grant Ayot work under your supervision as office manager? A. Yes.

Mr. Yerke: Now, your Honor, we can, I think, have identified through this witness the ledger and the journal, if there is any question on those, and then we will be through with that. It will take just a minute.

(Testimony of Harold Hamby.)

The Court: Go ahead.

Q. (By Mr. Yerke): Did Grant Ayot maintain a journal of the business transactions of Sutherlin Plywood Corporation? [123] A. Yes.

Q. Have you ever seen that journal?

A. I have.

Q. Did he make entries in the same under your supervision? A. He did.

Q. You have been handed, Mr. Hamby, what has been marked as Defendants' Exhibit 132-A for identification. Can you identify the same?

A. This is the journal of Sutherlin Plywood Corporation.

Q. Is that the journal that was maintained by Grant Ayot under your supervision?

A. It is.

Q. Did Grant Ayot also maintain a ledger while you were employed by Sutherlin Plywood Corporation? That question calls for a Yes or No answer.

A. Yes, he did.

Q. Was that ledger maintained under your supervision? A. Yes.

Q. You are familiar with the ledger?

A. I am.

Q. You have been handed what has been marked as Defendants' Exhibit 132-B for identification. Can you identify the same?

A. This is the ledger of Sutherlin Plywood Corporation.

Q. By "this" you are referring to Defendants' Exhibit 132-B? A. I am. [124]

(Testimony of Harold Hamby.)

Mr. Yerke: We renew our offer with respect to these two particular exhibits, your Honor, for the purpose of the record.

The Court: Any objection?

Mr. Anderson: I don't know what purpose they have. I don't believe that those are the documents that were identified. I am objecting to them. There has been no showing of any materiality of those documents.

Mr. Yerke: They will support the counterclaim that we have set forth in the answer, your Honor. They are the basic documents.

The Court: You are offering them in order to prove a claim?

Mr. Yerke: Beg pardon?

The Court: You are offering them to prove a claim?

Mr. Yerke: We offer them as the foundation documents in connection with the counterclaim. We are also offering them in connection with the financial condition of the corporation as displayed by the books.

The Court: Isn't it required that you show the books were kept in the regular course of business?

Mr. Yerke: I can ask him that, your Honor.

The Court: And whether they were correctly kept as far as he knows. Do you waive that?

Mr. Anderson: I waive that, your Honor. If I knew specifically what he was getting at there might be no objection, but I don't know what the

(Testimony of Harold Hamby.)

whole book is supposed to show. I don't [125] know how this supports the counterclaim.

Mr. Yerke: The counterclaim, Mr. Anderson, as you know from our conferences, involves a number of the transactions between Oregon Plywood Corporation, Oregon Plywood Sales Corporation and Sutherlin Plywood Corporation, such matters as the invoices or orders from Oregon Plywood Sales Corporation, the veneer purchases, the credits to be applied on one as against the other. These are the foundation documents which we need for that particular purpose. We intend to call the certified public account who set up the accounting procedures upon which these particular instruments were prepared, and then he will testify——

The Court: If it is just a matter of computation, that is one thing. But if the items are disputed, the mere fact that they made an entry wouldn't tend to prove or disprove any issue. For example, on the question of the \$336 that the plaintiff is claiming, if you had the item in here or didn't have it—if you had it, of course that might be an admission that you recognized the item. But if you contended that Oregon Plywood Sales owed you \$500 on a certain transaction and you had it down in the books, what would that tend to prove?

Mr. Yerke: I don't see how we could go ahead without having these in. It seems to me it is probative on that point.

The Court: I am going to admit them, but I am

(Testimony of Harold Hamby.)

going to admit them tentatively. Then we will see what happens with [126] the testimony.

Mr. Yerke: All right. Fine, your Honor.

(The journal and ledger above referred to were received in evidence as Defendants' Exhibits 132-A and 132-B, respectively, subject to the Court's qualification as stated above.)

Q. (By Mr. Yerke): You have been handed what has been received in evidence as Defendants' Exhibit 116, Mr. Hamby. Have you ever seen that instrument before? A. I have.

Q. Were you present when that was executed?

A. I was.

Q. Where was that executed?

A. In the office of Sutherlin Plywood Corporation.

Q. When was it executed?

A. So far as I know, it was in April.

Q. April of 1954? A. Right.

Q. Who was present at the time it was executed?

A. Grant Ayot, the bookkeeper, Marvin Steinbach, the secretary, myself, and Robert Hofheins.

Q. Who requested that this document be executed? A. Robert Hofheins.

Q. At the time that it was executed was there any discussion [127] among the group that you have named as to whether or not that particular instrument was for payment of the amount involved in these assigned accounts or was it for collateral security?

(Testimony of Harold Hamby.)

to the payment of said advance of \$11,000.00 There is no agreement on the second assignment.

The Court: It is a very unusual transaction, Mr. Yerke, for someone to take an assignment of a larger amount in payment of a smaller amount.

Mr. Yerke: I think we owed more at that time than \$12,000, your Honor. That is what it amounts to. The actual amount I don't know offhand, and apparently the witness doesn't. But the amount that we owed was in excess of \$12,000. I can show that through the accountant.

The Court: You say that there was nothing said about what would happen—let me hear your testimony again as to what was said with reference to this assignment.

A. It was taken in lieu of payment of the veneer in these orders.

The Court: That doesn't mean anything to me.

Q. (By Mr. Yerke): How did this come up, Mr. Hamby? What gave rise to this particular transaction?

A. In this particular instance there was a board meeting prior [130] to this, and Mr. Hofheins got up the next morning and went down to Multi-Ply Plywood Corporation without authority from anyone so far as we could find out, and he collected this \$4,000 check from them and brought it back to our office and demanded that this assignment be executed.

Q. What happened to the check?

A. That was in turn given to us provided we

(Testimony of Harold Hamby.)

reissue a check for the same amount to Mr. Hofheins, which we did.

Q. Is that \$4,000 figure shown on the bottom of Exhibit 116? A. It is.

Q. Do you recall the amount that was due and owing to Oregon Plywood Sales Corporation for the veneer from which the plywood was manufactured that is referred to on these four invoices covered by the assignment? A. I don't recall it.

Q. Do you recall the outstanding amount that was due and owing to Oregon Plywood Corporation for veneer at that particular time, veneer purchases? A. No, I wouldn't recall.

Q. During the time that you were employed by Sutherlin Plywood Corporation did that corporation experience any difficulty in meeting its payroll? A. We certainly did.

Q. On how many occasions?

A. On two different occasions. [131]

Q. When was the first occasion?

A. The first occasion was at the time we asked for the other \$30,000 on the open end mortgage. The exact date I am not positive of.

A. Those funds were forthcoming, were they?

A. They came in two different payments. We called Oregon Plywood Sales Corporation and Franklin Hofheins answered the phone, and he advanced, I believe, something like \$11,000.

Q. Then what was the second occasion when you encountered difficulties in meeting the payroll?

A. The second occasion was after we had stopped

(Testimony of Harold Hamby.)

production, immediately following the stoppage of production.

Q. What payroll were you concerned about then?

A. For the two weeks' period at the termination of production.

Q. Were you able to raise funds to cover that payroll?

A. Only by selling on the outside to different jobbers, was the only way we could raise any funds to meet that payroll.

Q. Were you ever threatened with labor liens while you were office manager?

A. We were on that particular occasion.

Q. Was there ever any difficulty in meeting insurance premium payments on the plant and property?

A. There was.

Q. When was that?

A. That was in June. [132]

Q. Of 1954?

A. The latter part of May or the first part of June.

Q. Of 1954? A. Of 1954.

Q. How were those premium payments met then?

A. Mr. Petherick guaranteed payment, and he was practically forced to make it, but we negotiated with Multi-Plyd on a car of plywood and got the money to cover that payment.

Q. You apparently were in the office from the time the mill shut down until sometime in early

(Testimony of Harold Hamby.)

June; is that right? A. I was.

Q. Did you have any contact with the creditors of Sutherlin Plywood Corporation?

A. Creditors sent me telegrams, long distance calls, registered letters, and so forth, demanding payment.

Q. Was that fairly continuous during that period of time? A. All the time.

Q. Did you personally ever participate in any attempts to reopen the mill after it shut down on April 21st, 1954?

A. We did. We had meetings and we attempted to open, but we just couldn't raise the funds any place.

Q. Did you yourself ever find a source of green veneer for the mill? A. I did.

Q. Where was that? [133]

A. At Brookings, Oregon, at the Kedrick plant.

Q. Were you ever able to obtain that veneer?

A. No.

Q. Why not?

A. We didn't have any funds.

Mr. Yerke: That is all.

Cross Examination

Q. (By Mr. Anderson): Mr. Hamby, were any labor liens ever filed? A. No.

Q. Now Mr. Hamby, about these assignments, isn't it true that on the first assignment there was an excess collected and credited to Sutherlin Plywood by Oregon Plywood Sales Corporation?

(Testimony of Harold Hamby.)

A. I believe that is right.

Q. You felt you were entitled to that?

A. Yes.

Q. What is the difference, if any, between the first assignment and the second assignment?

A. I would have to read them to answer that question.

The Court: He has already said that one is accompanied by a memorandum of the understanding.

The Witness: That is right.

Q. (By Mr. Anderson): Were there any different terms in the two assignments? [134]

The Court: You can stop right here. I am in favor of you on this issue so far.

Mr. Anderson: All right.

Q. Mr. Hamby, did I understand you to say you found a source of green veneer at Kedrick's plant in Brookings? A. I did.

Q. What was the reason you didn't buy it?

A. We had no funds.

Q. Now who paid for the green veneer?

A. Oregon Plywood Sales.

Q. It didn't make any difference, then, whether you had any funds or not?

A. It made a difference if we had no glue or any supplies to lay it up with.

Q. But as far as paying for it—

A. No means of supplying glue or paying labor to lay it up or process it.

Q. The lack of funds didn't prevent you from buying veneer?

(Testimony of Harold Hamby.)

A. Not from buying veneer, no.

Q. All right. Mr. Hamby, what kind of management did Sutherlin have?

A. There you are putting me on the spot.

The Court: Go ahead and say.

A. I think Sutherlin had good management, but they were just short of working capital. [135]

The Court: Is the management an issue raised in this? What number is that contention? What contention are you referring to?

Mr. Yerke: I don't believe there is any.

Mr. Anderson: No, we have made no—

The Court: What are you bringing it in for, then? I would like to ask you a question, Mr. Anderson. Are you contending in this case that Sutherlin had plenty of money to operate, that they were not in danger of any liens being filed, and that they were not requested to pay their bills? Is that your contention?

Mr. Anderson: I don't doubt but what they were in serious financial difficulty, your Honor.

The Court: Then what do you ask this witness this ridiculous question for?

Mr. Anderson: I think there may be some question about why they were in that situation.

The Court: That is not an issue in this case. You didn't raise it.

Mr. Anderson: I think the defendant has attempted to raise the issue about their condition.

The Court: Yes, but he raised the issue that they were losing money every month and that they sold

(Testimony of Harold Hamby.)

the plant because they didn't want to suffer any more losses and they couldn't open up because they didn't have the money with which to open up. [136]

Mr. Anderson: Frankly, I don't think that is any defense.

The Court: That might not be.

Mr. Anderson: But if it is, I think we should be entitled to show why they were in that situation, whether it was their fault or the plaintiff's fault or somebody else's fault.

Mr. Yerke: I think, your Honor, that it could only be material, the reason why would be material, if they could show that we shut down, lost working capital and suffered losses as matters of bad faith. Otherwise it is not germane to the issues here.

The Court: You had Mr. Hofheins on the stand. He didn't testify that he told them to fire this manager. He didn't state that the manager was driving the plant out of business.

Mr. Anderson: The reason I didn't put it on at that time, your Honor, is because I thought this was part of the defendants' attempted explanation of why they didn't perform. As I understand it, they are making the contention that they had some reason for not performing. They talked about this lack of financing. No. 3-C, your Honor, under the defendant Sutherlin's contentions, they say it was made necessary by the poor financial condition of the defendant Sutherlin.

The Court: How long will it take you to go into that question?

(Testimony of Harold Hamby.)

Mr. Anderson: Just a few minutes. I have a few questions I would like to ask this man since he is going to leave, as I [137] understand it, and wants to go back to his work.

The Court: All right. I have grave doubts as to the admissibility, I am telling you, but because I am letting in most of the evidence I am going to let this in also.

Q. (By Mr. Anderson): Mr. Hamby, first about the management. What kind of a manager did Sutherlin have?

A. Well, he was a man who wanted to carry the whole load himself—I will be frank with you—and not delegate too much power to others.

The Court: What was his name?

A. But he was a good plywood man. N. L. Patterson was his name.

The Court: What?

A. N. L. Patterson.

Q. (By Mr. Anderson): Now Mr. Hamby, did Mr. Patterson do a good job for Sutherlin?

A. I think he did the best he could under the circumstances.

Q. Could someone else have done a better job?

A. Perhaps. That is something I can't answer truthfully. I don't know.

The Court: I will assume that there is somebody in the world that could have done a better job.

Q. (By Mr. Anderson): Mr. Hamby, what was the monthly payroll of Sutherlin?

A. I don't just remember offhand. [138]

(Testimony of Harold Hamby.)

Q. Approximately?

A. I think around \$27,000, or something like that—twenty-seven or twenty-eight thousand.

Q. Do you know of any practices in the mill which were not as they should have been?

A. There was one particular practice I would like to bring out, or one particular incident that I happened to be sitting in on in N. L. Patterson's office when Franklin Hofheins contacted him on the phone, as Robert Hofheins testified, where he advised him to stock up on veneers. And he bought high-priced veneers. It naturally was up at that time. Then the market dropped. And we had veneer stacked every place in the yard that it was feasible to stack it. And we suffered some loss because it was stacked outside in the sun and the weather, and then the price skidded and went down on the manufactured product, and we were stuck with all this high-priced veneer.

Q. You are talking about stocking up in anticipation of the strike? A. That is right.

Q. You never did get a stockpile of veneer, did you? A. We certainly did.

Q. How was the quality control in the mill?

A. State that question again.

Q. How was the quality control? Do you understand? A. I don't understand your phrase. [139]

Q. Was all the veneer used in the best place for that quality of veneer?

A. It was to the best of my knowledge.

(Testimony of Harold Hamby.)

Q. How did Sutherlin happen to lose all this money? What was the reason for it?

A. What was the reason?

Q. Yes.

A. Because we were manufacturing with high-priced veneers and the price went down, and by the time we paid the five, five and two discounts we were operating at a loss.

The Court: What do you mean, five, five and two? Where was the second five?

A. One is the conventional discount——

The Court: What kind of discount?

A. One that the trade gives, and then there was the 5 per cent for the sales commission and then the 2 per cent, of course, for cash.

The Court: Every plant has at least five and two, don't they? A. That is right.

Q. (By Mr. Anderson): Mr. Hamby, were you critical of Mr. Patterson?

A. There were some practices that I didn't exactly approve of, yes.

Q. I tried once before to get your opinion on it and I will [140] try once more. Weren't there quite a number of practices which you thought should not have been engaged in by the manager?

A. Now what do you mean by quite a number?

Q. Just answer the question the best you can.

A. I told you that there were practices that I didn't approve of. I won't go so far as to say there were quite a number, because I liked the man.

Mr. Anderson: All right. That is all.

Mr. Yerke: No further questions.

(Witness excused.) [141]

MARVIN D. STEINBACH

was produced as a witness in behalf of the Defendants and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

The Court: Mr. Anderson, so that we can save time on cross examination, I am going to tell you that I am going to assume that Mr. Patterson was not the best plywood superintendent or manager that they could have obtained.

Mr. Anderson: All right, your Honor.

The Court: In all the cases that have come here I don't know of one in which there wasn't a complaint about the plywood management. Every cooperative that comes into this court, whether they go into bankruptcy or Chapter 11, or are just sued, somebody is complaining about the management. So I am going to assume that there were complaints about Mr. Patterson and that some of these complaints were valid.

Mr. Anderson: All right.

Q. (By Mr. Yerke): Mr. Steinbach, you are Secretary of Sutherlin Plywood Corporation?

A. I am.

Q. You have been Secretary since the organization of that corporation? A. I have.

Q. You are also a stockholder? [142]

A. That is right.

(Testimony of Marvin D. Steinbach.)

Q. Did you attend a meeting at Sweet Home that Mr. Hofheins testified about yesterday?

A. I did.

Q. That was in November of 1953?

A. The latter part of November; yes, sir.

Q. At that meeting did you hear anyone represent that Sutherlin Plywood Corporation would engage in continuous operation? A. No, sir.

Q. Defendants' Exhibit 134-A is the minutes of a special meeting of the Board of Directors of December 6, 1954, at the Eugene Hotel. Do you recall attending that meeting?

A. What was the date again?

Q. December 6th, 1954. A. Yes, sir.

Q. Was Mr. Hofheins at that meeting?

A. Yes, sir.

Q. Was there anyone else present at the meeting besides the Board of Directors of Sutherlin and Mr. Hofheins? A. Not that I recall.

Q. Now at that particular meeting were any documents presented for consideration by the Board of Directors? A. No, sir.

Q. No documents were presented? A. No.

Q. There were no documents considered at that time?

A. Yes, there were some that Mr. Hofheins had brought.

Q. What documents were those?

A. There was a rough draft of the sales agreement.

Q. Was that agreement executed at that time?

(Testimony of Marvin D. Steinbach.)

A. It was not.

Q. Why not?

A. There were several changes that had to be made that we couldn't agree on. I mean the original draft was presented by Mr. Hofheins.

Q. I notice that at the meeting of the board on that particular date that a resolution was passed authorizing the execution of the sales agreement. What agreement was that?

A. Well, that was the agreement after the changes had been made in the rough draft that Mr. Hofheins had brought.

Q. But the agreement was not executed after the changes had been made? A. No, sir.

Q. What happened to the agreement?

A. Mr. Hofheins said that he had to get his board of directors' okeh on it before he could sign it, and the Sutherlin board wanted to peruse it a little further themselves.

Q. Had a note and mortgage been prepared at that time? A. No, sir.

Q. Who prepared the note and mortgage, if you recall? [144]

A. Mr. Hoffman, who was Sutherlin's lawyer.

Q. Had he prepared it by the time of that meeting? A. No, sir.

Q. Now Defendants' Exhibit 134-I is a certificate concerning some resolutions passed at a meeting on December 12, 1954. Where was that meeting held?

(Testimony of Marvin D. Steinbach.)

A. That meeting was held in the offices of Sutherlin Plywood Corporation.

Q. Were you present at that meeting?

A. I was.

Q. Now that meeting refers to executing the mortgage, sales agreement and the loan agreement. Do you recall those instruments?

A. Yes, sir.

Q. What sales agreement was authorized for execution at that meeting?

A. The sales agreement that had been agreed upon by our attorney, Mr. Hoffman, and by the board.

Q. Now, going back to the meeting of December 6th, did anyone at that meeting, to the best of your recollection, represent that Sutherlin Plywood Corporation would engage in continuous operation?

A. No, sir.

Mr. Anderson: Is that the Sweet Home meeting?

Mr. Yerke: No, the meeting of December 6th, 1954, in the [145] Eugene Hotel, which is referred to in the minutes about which he has been testifying.

Mr. Anderson: Is this the Eugene meeting we talked about all day yesterday?

Mr. Yerke: Our position is there were two Eugene meetings. Mr. Hofheins recalls only one. I am speaking now of the meeting of December 6th, 1954. The minutes which you examined, Exhibit 134-A, recite what occurred at that meeting.

Q. (By Mr. Yerke): Was there another meet-

(Testimony of Marvin D. Steinbach.)

ing at the Eugene Hotel later in the month of December? A. There was.

Q. And the documents in question here recite that they were executed on December 17th, 1954. Was that the date of the meeting? A. That was.

Q. Did Mr. Hofheins attend the meeting?

A. He did.

Q. Who else attended the meeting on behalf of Oregon Plywood Sales Corporation or Oregon Plywood Corporation?

A. Mr. Swan and I believe Mr. Sadoff was there.

Q. Mr. Swan was the attorney, was he not?

A. That is right.

Q. For Oregon Plywood Corporation?

A. That was our understanding.

Q. At that meeting was there any representation made that [146] Sutherlin Corporation would engage in continuous operation of its mill?

A. No, sir.

Q. Were the documents executed at that particular meeting? A. They were.

Q. Do you recall any particular instances, Mr. Steinbach, when the mill after it commenced operating had difficulty meeting payrolls?

A. Yes, I do.

Q. In how many instances?

A. I would say two or three.

The Court: There has been no dispute about that.

Mr. Yerke: All right. We won't put on any further testimony, your Honor, on that point.

(Testimony of Marvin D. Steinbach.)

The Court: That evidence came out in the plaintiff's case in chief on two occasions, that they had difficulty in meeting the payroll.

Q. (By Mr. Yerke): Now, Exhibit 134-C, Mr. Steinbach, which has been received in evidence, is a copy of the minutes of the Board of Directors' meeting of March 27th, 1954. Did you attend that meeting? A. I did.

Q. You prepared the minutes of that meeting, did you not? A. Yes, sir.

Q. Was Mr. Hofheins present at that meeting?

A. I don't recall. What was the date again?

Q. March 27th, 1954.

A. Yes, he was there March 27th.

Q. Now those minutes recite, Mr. Steinbach, that the board advised Mr. Patterson, the General Manager, to cease all purchases of veneers and to operate until the present stock was exhausted. Why was that, if you recall?

A. Because our yard was full of veneers. They had been stocked up by Mr. Patterson, and our capital was exhausted, our working capital was exhausted, and we didn't want to endanger our stockholders any further than they were.

Q. Did Mr. Hofheins object to these directions to Mr. Patterson? A. No, sir.

The Court: Did what?

Mr. Yerke: Did Mr. Hofheins object to these directions to Mr. Patterson. The answer was No.

The Court: What date is that?

Mr. Yerke: That is March 27th, 1954.

(Testimony of Marvin D. Steinbach.)

Q. At that meeting was there any discussion concerning shutting down the plant?

A. Not that I recall.

Q. Now you recall the date the plant shut down, do you not, Mr. Steinbach?

A. It was April the 21st.

Q. 1954? A. 1954. [148]

Q. Why did the plant shut down?

A. Our working capital was completely exhausted. We were threatened with labor liens and our power had been shut off.

Q. Did you personally after the plant was shut down make any efforts to assist in reopening the plant? A. I did.

Q. What did you do?

A. Alone and in company with Mr. Petherick and other members of the board I visited the local bank, Mr. Clem Howard is the manager, trying to get an additional loan so we could have working capital to go ahead and open up the plant. We were unsuccessful. We also went to the United States National Bank in Roseburg and were unsuccessful there. Both bankers, Mr. Small, of the U. S. National Bank in Roseburg, and Mr. Howard from the Sutherlin Branch of Douglas County State Bank, both told us that they didn't think it would be possible for us to get a loan from any other bank.

Q. Did you personally try to sell any additional stock in the corporation? A. I did.

Q. Were those efforts successful? A. No.

(Testimony of Marvin D. Steinbach.)

Q. Did you contact any plywood plants in an attempt to get refinancing? A. Yes. [149]

Q. Will you name some of those plants.

A. Aetna Plywood, Multi-Plyd, M & M Plywood, I believe, and Colorado Fuel——

Q. That is enough. Now you mentioned that the power was shut off on or about April 21st, 1954. Why was it shut off?

A. For nonpayment of the bill.

Q. Was a watchman maintained at the plant after the plant was shut down? A. Yes.

Q. Did you encounter any difficulty in paying him? A. We did.

Q. Did you personally assist in making payments to him? A. I did.

Q. What did you do?

A. I contributed \$200 towards the payment for the watchman's wages.

Q. There has been testimony here, Mr. Steinbach, you were present at the time that Defendants' Exhibit 116 was executed. Were you present when that particular instrument was executed?

A. I was.

Q. Where was it executed?

A. In the office of Sutherlin Plywood Corporation.

Q. Who was present? [150]

A. Mr. Hamby, Mr. Ayot, Mr. Hofheins and myself.

Q. Do you recall the circumstances under which it was executed? A. I do.

(Testimony of Marvin D. Steinbach.)

Q. What were those circumstances?

A. As related by Mr. Hamby, Mr. Hofheins had collected that \$400 check from Multi-Plyd——

Q. You mean \$4,000?

A. \$4,000, rather, and came to the office and demanded that we deposit that and immediately give him a check covering the same and that we give him an assignment on the balance on these invoices that had been sent as outlined in this assignment.

Q. Was there any discussion, Mr. Steinbach, to the best of your recollection, as to whether or not the assignment was for payment of the amounts due or whether it was for security, if you recall? That calls for a Yes or No answer. Was there any discussion?

A. Yes, I believe there was.

Q. What was that discussion, as best you can recall?

The Court: You tell me what Mr. Hofheins said and what you said or what some other people said, as best you can recall it.

A. Well, I don't recall the exact words, but to the best of my recollection I think we insisted that this assignment was for payment of the account to be credited——

Mr. Anderson: I object, your Honor. I [151] want the witness to testify what they said and who said it.

The Court: How did that happen to come up? Did you have a discussion as to whether this was

(Testimony of Marvin D. Steinbach.)

going to be for security or for payment? Did Mr. Hofheins say this was merely for security, and some one of your group said, "No, this is going to be in full payment; if you take this assignment it is in payment and you take your chances"? Was anything like that said?

A. As I recall, Mr. Hofheins said that he wanted it in for collateral, and we insisted that it be for payment.

The Court: Why did you insist that it was payment rather than as collateral? What was the basis of that?

A. Because he had already on his own collected the \$4,000.

The Court: That was only \$4,000. What difference would it have made as to the \$4,000 if he had already collected it or hadn't collected it?

A. We contended that if he had taken it upon himself to collect the \$4,000 he considered that the accounts were his.

The Court: And you told him so at the time?

A. I believe we did; yes, sir.

The Court: You are not just figuring these things out now a couple of years later?

A. No, sir.

The Court: How about the previous one of April 6th?

A. That was for collateral, I believe, because it stated so in the exhibit. [152]

The Court: You didn't think to prepare another memo to say that even though the April 6th

(Testimony of Marvin D. Steinbach.)

assignment was for collateral this one was in full payment? A. No, sir.

The Court: And it was your understanding that if he collected any overplus that belonged to him?

A. Well, it was to be credited to our account.

The Court: Did you know at that time that the Coastal Lumber Company was in financial difficulties? A. No, sir.

The Court: Why did you insist, then, that the amount be accepted by Mr. Hofheins in full payment rather than as collateral?

A. Because we wanted our accounts to be brought up to date.

The Court: All right.

Q. (By Mr. Yerke): Did you work in the office there, Mr. Steinbach? A. I did not.

Q. Do you recall who prepared the earlier assignment of April 5th? A. No, I do not.

Q. Now do you recall a meeting of the creditors of Sutherlin Plywood Corporation in June of 1954?

A. Yes, sir.

Q. Did you attend that meeting? [153]

A. I did.

Q. What happened at that meeting?

A. Notices had been sent out to all the creditors of Sutherlin Plywood Corporation, and they met in the offices of the plant, and at that meeting a creditors' committee was formed after the financial conditions of Sutherlin had been explained to them.

The Court: What date was that?

Mr. Yerke: That was early June, I believe.

(Testimony of Marvin D. Steinbach.)

Let's see. I can get it from the witness.

Q. Did you prepare the minutes which are Defendants' Exhibit 134-D, minutes of June 7th, 1954?

A. I did.

Q. Those minutes, Mr. Steinbach, referred to the calling of a meeting of creditors of June 11th, four days later. Was that the date of the meeting of creditors?

The Court: June 12th.

Mr. Yerke: That is the stockholders, your Honor. June 12th is the stockholders.

The Court: Oh.

A. Yes, sir.

Q. (By Mr. Yerke): The creditors, then, met on June 11th in accordance with this resolution?

A. That is right.

Q. Now at this meeting of creditors was [154] there any discussion of the sale or lease of the assets of the corporation? A. No, sir.

The Court: Do you have the minutes of the meeting of creditors?

Mr. Yerke: There were no minutes kept, your Honor, as far as I know. At least, they are not in the minute book.

The Court: Who was represented among the creditors?

A. Sutherlin Machine Works, Mr. Conway from the Coe Manufacturing Company, and someone from—I believe it was the Marietta Glue Company, and Mr. Lee from the Union Oil Company. That is all I recall right now.

(Testimony of Marvin D. Steinback.)

Q. (By Mr. Yerke): How many creditors were there, if you recall?

A. There was around ten or eleven. I don't remember. I was also there as a creditor, your Honor.

The Court: Was Mr. Hofheins there as a creditor? A. I don't believe that he was.

The Court: You don't believe he was?

A. No.

Q. (By Mr. Yerke): There has been admitted in evidence, Mr. Steinbach, Defendants' Exhibit 134-E, which is a special meeting of the stockholders on June 12th, 1954. Did you attend that meeting? A. I did.

Q. That was a day after the creditors' meeting?

A. That is right. [155]

Q. Were there any creditors present at that meeting? A. A few; yes, sir.

Q. Up to that point had there been any threats of litigation by creditors? A. Yes.

Q. Were you having any difficulty with the watchman at that time because of his wages?

A. Yes, we had a threat of lien, wage lien.

Q. Now that particular exhibit, 134-E, Mr. Steinbach, refers to a resolution which is as follows: "That the Board of Directors negotiate to dispose of the plant or to get refinancing or to dispose of the situation as is in their estimation to the best interests of the stockholders." Do you see that in the minutes? A. Yes, sir.

Q. Up to that point had the directors and officers

(Testimony of Marvin D. Steinbach.)

of Sutherlin Plywood Corporation made any attempt to sell or lease the assets of the corporation?

A. No, sir.

Q. Now, in connection with this authorization of sale which is recited in these minutes, did you personally contact any attorneys concerning the effect of the sales agreement upon the sale?

A. I did.

Q. What attorneys did you contact? [156]

A. I contacted Mr. Ray Compton in Roseburg, and he referred me to Mr. George Luoma.

Q. That is Mr. George Luoma sitting next to me?

A. Yes, sir.

Q. Who else did you contact?

A. Carl Francis in Dayton, Oregon, and also Mr. Theodore Bloom in Portland.

Q. What question did you pose to Mr. Francis?

A. I asked him if the contract with Oregon Plywood Corporation or Oregon Plywood Sales Corporation was binding upon Sutherlin in the event that a sale of the assets was made.

Q. Were you given advice by Mr. Francis?

A. Mr. Francis advised us that in his estimation the contract would not be binding upon any purchaser.

Q. Was that advice given—

Mr. Anderson: If the Court please, I object and ask that the answer be stricken as hearsay.

Mr. Yerke: We offer it on the same basis as previously tendered, your Honor.

The Court: Just to show good faith?

(Testimony of Marvin D. Steinbach.)

Mr. Yerke: That is right.

The Court: Just to show good faith.

Mr. Anderson: It still is hearsay, your Honor. Mr. Francis is not very far away. He can be brought here.

Mr. Yerke: You bring him then, Mr. Anderson.

The Court: All right. Objection overruled. I really don't think it is necessary.

Mr. Yerke: All right. I won't go into it any further. It was just that one issue we were concerned about, your Honor.

The Court: There is no evidence here as yet anyway that there was any bad faith on the part of the directors of this corporation in selling. If there is, I haven't heard it. Maybe they are going to put in such evidence, but this is an anticipatory defense.

Q. (By Mr. Yerke): Now did you attempt to sell the assets personally of Sutherlin Plywood?

A. Mr. Wood, Mr. Petherick and I approached several plywood plants trying to sell it to them, or brokerage houses.

Q. Now Exhibit 134-F, Mr. Steinbach, is admitted in evidence. That is the minutes of a special meeting of the Board of Directors on July 28th, 1954. Do you recall that meeting? A. I do.

Q. Mr. Hofheins attended that meeting, did he not? A. He did.

Q. Do you recall a resolution that was passed at that meeting concerning the sale or lease of the assets of the corporation? A. I do.

(Testimony of Marvin D. Steinbach.)

Q. Do you recall when that resolution was voted on, Mr. Steinbach? A. I do. [158]

Q. How did Mr. Hofheins vote?

A. Mr. Hofheins didn't vote for it or he didn't vote against it.

Q. Did he raise his hand? A. He did not.

Q. Did he say anything? A. He did not.

Q. Did he discuss at all the advisability of the sale or lease of the assets of the corporation?

A. After the vote had been taken Mr. Hofheins said that that was the only thing that was left for us to do.

Q. And at that meeting were any of the pending deals for the sale or lease of the assets outlined to the directors? A. They were.

Q. Did Mr. Hofheins object to any of those deals as outlined? A. No, sir.

The Court: Before the vote was taken did Mr. Hofheins announce that the purchaser would be bound by the contract?

A. Not that I recall, sir.

The Court: Did he say that you couldn't dispose of the plant because of the contract with Oregon Plywood Sales?

A. I don't recall that he did. Otherwise he would have voted against it.

Q. (By Mr. Yerke): Did he threaten a lawsuit at the time? A. No, sir. [159]

Q. At that meeting you also passed a resolution calling another directors' meeting for August 9th, 1954, did you not? A. Yes, sir.

(Testimony of Marvin D. Steinbach.)

Q. Was Mr. Hofheins present when that resolution was passed? A. He was.

Q. Now Exhibit 134-G, Mr. Steinbach, is the minutes for the stockholders' meeting of August 9, 1954. Do you recall attending that meeting?

A. Stockholders' meeting?

Q. Yes, of August 9, 1954. A. Yes, sir.

Q. You did? A. Yes.

Q. Did Mr. Hofheins attend that meeting?

A. No.

Q. Following that meeting was there a special meeting of the Board of Directors?

A. There was.

Q. Did Mr. Hofheins attend that meeting?

A. No.

Q. Up to that point had any protest been received from Oregon Plywood Sales Corporation concerning the contemplated sale or lease of the assets of the corporation?

A. Not to my knowledge.

Q. Now following the meeting of the Board of Directors of [160] August 9, 1954, did the directors advise Adams and Jacobson that the plant would be sold to them? A. Yes.

Q. Have you ever been paid any compensation as an officer or director of Sutherlin?

A. I have not.

Q. Have any of the other officers or directors been paid any compensation? A. No, sir.

The Court: Are you the man that is a truck driver?

(Testimony of Marvin D. Steinbach.)

A. Yes, sir. Rather, I am a trucker, your Honor, not a truck driver.

The Court: You are a trucker. You own the truck? A. Yes.

The Court: Sometimes there is no distinction.

Q. (By Mr. Yerke): One other question, Mr. Steinbach. At the meeting at Sweet Home with Mr. Hofheins did you furnish to him or did one of the directors furnish to him a financial statement of the corporation; that is, including a balance sheet?

A. Yes. I believe the balance sheet was as of October the 31st, 1951.

Q. You mean 1953? A. '53, yes.

Q. Who had prepared that, if you recall?

A. Stearns & Flynn, I believe. [161]

Q. You have been handed what has been received in evidence as Defendants' Exhibit 131-A, Mr. Steinbach. Is that a copy of the statement that was furnished Mr. Hofheins at that time?

A. I would say that it is; yes, sir.

Mr. Yerke: No further questions.

The Court: I am convinced on the basis of the testimony now that the company was in a difficult position at the time that they closed and that it could not meet its payroll; that they made attempts to refinance and could not refinance, and that they probably did all they could do in order to salvage what they had. On the basis of the testimony I have heard yesterday, even without seeing the financial statement, I am convinced that Mr. Hofheins

knew that he was not dealing with the United States Steel Corporation or the U. S. Plywood Corporation. He knew he was dealing with a company that was just getting started, with a considerable portion of the capital being put up by the people who were working in the plant, and that the officers of the corporation would be people who had limited experience in dealing with the operation of a plywood plant.

I am also convinced that one of the risks that a person takes when they deal with a company of that kind is the fact that they may not engage in a continuous operation. I don't doubt that these men all expressed the hope that they would be successful and be able to operate over a long period [162] of time. I think that the confidence of people of that kind, who entered into this arrangement, was much greater about the profit that they would make in the length of time that they would be able to operate than experienced people like Mr. Hofheins, who has seen companies come and go.

For that reason I am not impressed with any representations having been made of continuous operation, and even if such representations were made I can't believe that an experienced businessman like Mr. Hofheins would have relied upon that kind of a representation.

Likewise, I am not impressed with the defendants' testimony with reference to the assignment. Just as I think it flies in the face of human experience for Mr. Hofheins to rely on statements made by these people as to continuous operation, I

think it flies in the face of human experience for Mr. Hofheins to have accepted this type of assignment in full payment of the obligation. This has been a long time after the event, and I think that the desire to have it accepted in payment is the motivating cause for the testimony of some of these people. I am not accusing them of any deliberate intent, but the evidence that he accepted it as full payment is certainly unsatisfactory, and you will have to have some better type of testimony to make me believe that it was accepted for any other reason than as security. Of course, Mr. Hofheins was taking it in order to get paid, but he didn't [163] accept the invoices in payment. There is a real distinction between those two.

Now what consequences will flow from the remarks which I have made earlier I don't know. I don't know whether a company which has entered into the type of contract that the Sutherlin Plywood Corporation entered into can by shutting down avoid the consequences of their contract. I would be very much surprised if there was any liability on the Nordic Plywood Corporation, but I just don't know as far as Sutherlin Plywood is concerned.

Unless you want to put in evidence to corroborate the cumulative evidence to show good faith or financial inability, I don't think it is necessary. I mean unless the plaintiff has some evidence to show that these people acted capriciously or fraudulently. If you wanted to assert that claim, I don't know whether you could or not under the pretrial order. You have made no such contention.

I am not impressed, as I told you before, that the manager was not everything they had hoped for. Most of the plywood plants in this area haven't got good managers. That is the reason they fold up. That is the reason U. S. Plywood and all the rest of them make money and the rest of them don't make money. It is just a question of management.

I have unburdened myself as to how I feel. I have said these things in the hope that it might indicate what [164] additional testimony should be put on. Now if you have any evidence along these lines that you think I should hear, I will be glad to hear it, and then you can put on your other evidence. But the evidence in the plaintiff's case in chief was that they did not own the equipment. They were just buying the equipment on contract. That is not very much security. Go ahead.

Mr. Yerke: We have two other memoranda we would like to submit to the Court at this time on the issues involved, your Honor.

The Court: What are they?

Mr. Yerke: One is on the question of the alleged tort here by Nordic and the other is in connection with the argument of consideration, usury and the statute of frauds.

The Court: Oh, I am not interested in that. The statute of frauds, what has that got to do with this?

Mr. Yerke: I will defer to Mr. McClanahan on that.

Mr. McClanahan: If the Court please, the statute of frauds is only, so to speak, a tactical argument in this matter. We don't contend that it is going to be dispositive of the thing.

The Court: Going to be what?

Mr. McClanahan: Going to be dispositive of the matter, and in view of the plaintiff's case in chief it may be disregarded entirely. They have not contended, for instance, that there is any consideration for this sales agreement other than [165] what they said they were going to do and what is in the loan agreement. Now we submit that anything that is not in the loan agreement or in the note and mortgage or in the sales agreement cannot be shown as consideration for this because of the statute of frauds.

The Court: All right. What about usury?

Mr. McClanahan: The usury point, your Honor, we tried in this memorandum to show that there is absolutely no consideration for the extra 5 per cent, the 5 per cent over the wholesale jobber's price which the Oregon Plywood Sales Corporation was to get. There was absolutely no consideration for it other than the promises contained in the loan agreement. Now if that was a consideration——

The Court: Wait a minute. Let me see. You mean that the ordinary broker gets 5 per cent——

Mr. McClanahan: Here is the thing, your Honor: They didn't promise to buy a stick or a foot. That is the difference between this and many output contracts, your Honor.

Mr. Anderson: They promised to buy all the green veneer.

Mr. McClanahan: Just a moment. In the sales agreement—and that is why, I think, we have got to take these documents separately——

The Court: You mean to say that if they had agreed to buy all of the output then they would be entitled to 5 per cent, and this way they are not?

Mr. McClanahan: It is a matter of negotiations again. But here is the thing, your Honor——

The Court: Where did you get the authority on which you rely? Have you got any other contracts like this? I think your argument is just fantastic.

Mr. McClanahan: I would request the Court to consider the authorities and the usury section.

The Court: You know, if you would stick to the main issue instead of coming in on all the tangential issues these cases would go a lot quicker. Let me tell you something else as a matter of trial technique, just as a matter of friendly advice. If you would stop all this and stick to the main issue instead of going out on this assignment issue and things of that kind it would be a lot better. I think you have a good case. Why don't you stick to it?

(Thereupon a recess was taken until 1:45 o'clock P.M. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:) [167]

MARVIN D. STEINBACH

a witness produced in behalf of the Defendants, resumed the stand and was further examined and testified as follows:

Cross Examination

Q. (By Mr. Anderson): Mr. Steinbach, in all your negotiating with Mr. Hofheins for the ar-

(Testimony of Marvin D. Steinbach.)

arrangement which was finally culminated with the December 17th agreement, what did you represent in regard to how much money Sutherlin needed?

A. As nearly as I can recall, we requested \$100,000 from them, and they suggested that \$50,000 would be enough, and we finally settled on the \$80,000.

Q. What did you advise Oregon Plywood about your condition at that time, your financial condition?

A. I don't know as I understand your question.

Q. Did you advise Oregon Plywood Sales Corporation that with this \$80,000 you would be in a position to operate?

A. We advised them that we would be in a position to start operations and we hoped to continue.

Q. Mr. Steinbach, I believe you testified today you felt Sutherlin was not bound by the sales contract. Is that your present testimony?

A. I didn't hear you on account of the noise.

Q. Is it your testimony today that you do not consider the sales contract in force as to Sutherlin?

A. No, I think I testified yesterday that I considered that the sales contract was in force with Sutherlin as long as they were in production.

Q. As long as they owned the mill? A. Yes.

Q. Now you gave some testimony on your direct examination about some advice from lawyers that you had received. Didn't the advice from lawyers lead you to believe that the contract was in force?

A. The advice from the lawyers—the opinion

(Testimony of Eugene F. Cunningham.)

A. That is right.

Q. How long have you been Chairman of the board?

A. Since the inception of the company, since it was organized.

Q. Are you also a shareholder in that corporation? A. I am.

Q. Have you done any work for that corporation as an employee other than serving as an officer and director? A. No.

Q. Do you recall attending a Board of Directors' meeting at Sutherlin in March, 1954, March 27?

A. Yes, I do.

Q. Was Mr. Hofheins at that meeting? [172]

A. He was.

Q. Was there a discussion at that time about shutting down the plant?

A. A very extensive discussion.

Q. Did Mr. Hofheins object to that in any way?

A. No.

Q. Did he threaten a lawsuit? A. No.

Q. Have you had any conversations over the telephone with Mr. Hofheins since the execution of the sales agreement on December 17th, 1953?

A. Yes, I had numerous conversations with him after that March 28th meeting?

Q. Since the March 28th meeting?

A. That is right.

Q. 1954? A. That is right.

Q. Did you ever discuss with him the assignment of Western Door & Plywood Company invoices?

(Testimony of Eugene F. Cunningham.)

A. I didn't discuss the assignment; no, sir.

Q. Did you ever discuss with him an extension of time on those invoices?

A. We were negotiating relative to possible financing of the company, and I asked how he was getting along with the collection of those accounts because I was interested in seeing that he [173] did get his money as a matter of keeping things in good relationship between us.

Q. What did he advise you?

A. He remarked that he had extended the time and taken some notes from Mr. Morris of Western Door giving him additional time.

The Court: Was there any extension made on the Coastal account?

Mr. Yerke: No, your Honor.

The Court: What difference would that make?

Mr. Yerke: They are covered by the same assignment.

The Court: Yes, but if Western Door didn't pay then you could contend that the extension of time was a change in the obligation. But how are you going to claim any benefit from that? As I understood it, the Western Door paid their account.

Mr. Yerke: They ultimately did; that is right.

The Court: No claim is being made on Western Door.

Q. (By Mr. Yerke): Did you attend the meeting of the creditors down at Sutherlin on July 11th?

A. Yes, I did.

(Testimony of Eugene M. Cunningham.)

Q. Did you attend the shareholders' meeting the following day? A. I did, sir.

Q. You recall the passage of that resolution authorizing the Board of Directors to dispose of the assets of the company, do you? [174]

A. Yes, sir.

Q. Did you ever seek legal advice concerning the right of Sutherlin Plywood Company to dispose of its assets? A. Yes, I did.

Q. From whom?

A. Raymond D. Ogden, Sr., in Seattle.

Q. He is a lawyer practicing there?

A. That is right.

Q. What was the nature of the advice you sought from him?

A. I wanted to know what the situation would be in the event that we had to sell or lease our assets. We were in a desperate condition, and I felt it was necessary that we either sell or lease them, and I got his opinion relative to what the liability of Sutherlin would be in the event that we sold our assets.

Q. What was that opinion?

Mr. Anderson: If the Court please, I object to this testimony unless the opinion is produced or the witness is produced. I think the testimony of these witnesses has shown that the sum total of the opinions they got led them to believe the contract was in force. And I object to this hearsay testimony.

Mr. Yerke: We offer it on the same basis as the

(Testimony of Eugene F. Cunningham.)

other, your Honor. There is no written opinion.

The Court: I sustained the previous objection, and then you went into the whole question. You are the one that is bringing this up, Mr. Anderson. You asked the questions, and [175] then when they tried to bring it out with another witness you object.

Mr. Anderson: Your Honor, I went into what the opinion of the Board of Directors was. I did ask Mr. Steinbach in his deposition whether they had sought this type of advice and he said no; the type of advice they sought was what the effect would be on the purchaser.

The Court: Maybe Mr. Steinbach only asked for that advice, but here Mr. Cunningham goes further. I might say that really I am not interested in what Carl Francis or Ted Bloom or any of these lawyers gave as advice, really. That is for me to determine.

Mr. Yerke: We realize that. It is only on the matter of good faith, your Honor.

The Court: That is right.

Mr. Anderson: I make the further point, your Honor, that unless they show what the Board of Directors believed from all the advice they got this piecemeal material doesn't mean anything.

The Court: I think probably there is something in that. Was the question of the liability of the company discussed at a board meeting?

A. Oh, definitely.

The Court: And were these various opinions of lawyers discussed in the meeting? [176]

A. Yes, sir.

(Testimony of Eugene F. Cunningham.)

The Court: Was Mr. Hofheins there?

A. No, I don't believe he was at that time. I think most of this came up after the March 28th meeting.

The Court: At what meeting did it take place?

A. At the later meetings, when we were faced with the problem of either selling or leasing the property, about the time of the stockholders' meeting.

The Court: Did you report as to your conversations?

A. Oh, yes, and the other boys reported as to theirs also.

The Court: Tell us what took place at that meeting, at the board meeting.

A. There was a general discussion of the situation and what had to be done, and that we were facing desperate circumstances.

Mr. Anderson: May I ask which meeting we are discussing now?

The Court: There is the minutes of that meeting here in the file; that is, in evidence.

Q. (By Mr. Yerke): Which particular meeting now do you have in mind, Mr. Cunningham?

A. I think it would be about June, the general discussion.

Mr. Yerke: He is referring, I think to the stockholders' meeting of June 12th following the creditors' meeting. That is where the first resolution was passed on the matter of selling the assets. [177]

A. That is right; about that time. I believe Mr.

(Testimony of Eugene F. Cunningham.)

Hofheins was present at that meeting where there was a discussion.

Mr. Yerke: That is 134-E, your Honor.

The Court: It doesn't say anything about asking advice from lawyers.

The Witness: That is perhaps true, but it was discussed, I am sure.

The Court: All right. Go ahead.

Q. (By Mr. Yerke): Was Mr. Francis present at that meeting, if you remember?

A. He was at the stockholders' meeting; not at the directors' meeting.

Q. Did you get a written opinion from Mr. Ogden on the subject? A. No, I did not.

Q. Now following this meeting of June 12th, 1954, the stockholders' meeting, did you discuss the sale or leasing of the assets with John R. Adams?

A. Did you say after that meeting?

Q. Yes.

A. Yes. We were discussing the matter of whether we could work out some kind of a lease agreement.

Q. That is the same Mr. Adams who with Mr. Jacobson ultimately purchased the plant; is that right? A. That is right.

Q. Now do you recall the directors' meeting [178] Mr. Cunningham, of August 9th, 1954?

A. Yes, I do.

Q. Did you attend that meeting?

A. I did.

Q. At that meeting was there a discussion of

(Testimony of Eugene F. Cunningham.)

the deals then pending as far as the sale or leasing of the assets was concerned? A. Yes, Sir.

Q. Were all of the pending deals considered at that meeting?

A. They were. There were three of them.

Q. All right. Will you tell the Court what those three deals were.

A. One of them was a sort of a cooperative and was in intangible form. It was from a man who had endeavored to organize a cooperative prior to that time. He did come over from the Coast and visited us once prior to that meeting, and he submitted in written form a proposition which we didn't consider of value.

We had another one from "Smoky" Johnson. I believe it is the Grants Pass Plywood; is that correct?

Q. I don't know.

A. I believe that is the same that his company goes under. Anyhow, "Smoky" Johnson. He called me on the telephone the morning of the 9th and advised me that he was finally able to go through a deal on the financing end of it; that he would be able to get the money and he gave me a figure [179] which was slightly higher than Mr. Adams' and Mr. Jacobson's figure. I laid that entire proposition in front of the board. I also put Mr. Adams' and Mr. Jacobson's proposition in front of the board. It was finally decided that, everything considered, we would be much more secure and the stockholders'

(Testimony of Eugene F. Cunningham.)

interests would be best served by accepting Adams' and Jacobson's offer.

Q. Why did you turn down Mr. Johnson's offer?

A. Because we felt there was some question as to whether he was able to get the money necessary and whether he would be able to get it in the time that it was necessary for us to act. Things were very pressing at the moment. We had little time to act, and otherwise we would have been in bankruptcy.

Q. Do you recall the amount of the offer by this cooperative or possible cooperative organization?

A. I don't at the moment, no.

The Court: I don't think that is necessary. There is no contention made here that they didn't take the best offer. It is just the fact that the offeree didn't assume the obligation of the plaintiff. That is right, isn't it?

Mr. Yerke: That is all, Mr. Cunningham.

Cross Examination

Q. (By Mr. Anderson): Mr. Cunningham, did you attempt to hire Mr. Adams as manager for Sutherlin Plywood? [180]

A. No. We needed no manager at the time.

Q. But he did apply for the job?

A. That is right. He was sent to me or referred to me by a mutual friend, Mr. George Hanford of the Lacey Plywood Company.

Q. Did you have any manager at that time?

A. No. He had heard that Mr. Patterson had left the organization.

(Testimony of Eugene F. Cunningham.)

Q. At that time you had no manager?

A. That is right.

Q. And Mr. Adams presented himself to you and asked for the job as manager? A. Correct.

Q. Did you advise the other members of the Board of Directors of that fact? A. I did.

The Court: When was that?

A. Shortly after Mr. Patterson had left. I think possibly a couple of weeks. I would say it was about the first of June or middle of May.

The Court: That was after the plant had shut down? A. That is right.

Q. (By Mr. Anderson): You were familiar with Mr. Adams' operating background, were you not?

A. Only in geenral, what Mr. Hanford had told me, what he told me of it. I hadn't been acquainted with the gentleman [181] prior to that.

Q. You knew something about him, though, didn't you?

A. I had never heard of him prior to that.

Q. Actually, you knew he was a crackerjack in plywood, didn't you?

A. No, I didn't. I don't know that he is a crackerjack yet. He may be, but I don't know it.

Q. Were any discussions had by the board about hiring Mr. Adams as manager?

A. No. We had no need for a manager at that time, because there wasn't anything he could do. We were out of money completely and we couldn't operate until we arranged finances.

(Testimony of Eugene F. Cunningham.)

Q. Actually, what you needed most of all was a manager, wasn't it?

A. No, sir. What we needed was some finances. We had creditors on our neck, and there was nothing we could do about it.

Q. Did you ever advise Mr. Hofheins that you could hire Mr. Adams as manager?

A. Yes, I did.

Q. When did you advise him that?

A. On one of our telephone conversations I mentioned the fact that he was available.

Q. What date?

A. Oh, I would say it was probably mid-June or somewhere around [182] there, the first of June or somewhere in that neighborhood. We had several conversations from time to time. I don't recall the date of it.

Q. Was there any discussion of hiring Mr. Adams as manager at the meeting on July 28th which Mr. Hofheins attended? A. No, no.

Q. Mr. Cunningham, when did you start receive these legal opinions that you talked about?

A. I would say my first call was about, oh, mid-June, or somewhere in that neighborhood, investigating the possibilities.

Q. Those opinions were discussed at the subsequent board meetings?

A. Ultimately we compared notes on all of the opinions that we had gotten, and they seemed to be more or less in line.

Q. Were those opinions discussed at the July 28th board meeting?

(Testimony of Eugene F. Cunningham.)

A. I don't think so. That is my best recollection that they were not at that time. We were concerned with other matters.

Q. Why weren't they discussed at the July 28th board meeting? A. Well, that I wouldn't know.

Q. Was it because Mr. Hofheins was present?

A. No.

Q. Was Mr. Hofheins advised about these opinions you were seeking? A. How is that? [183]

Q. Was Mr. Hofheins advised about these legal opinions you were seeking?

A. We had already had some opinions relative to the thing, and there was no particular thing that we needed to discuss in that respect.

Q. I take it your answer is that Mr. Hofheins was not advised that you were seeking legal opinions?

A. That is correct. He was not advised that we were seeking legal advice.

Q. Was Mr. Hofheins ever advised that you questioned the contract or sought an interpretation of it?

A. I don't believe I quite understand your question.

Q. Was Mr. Hofheins ever advised that you were seeking legal advice or that you were concerned about the legal validity of the sales contract?

A. I don't think I ever advised him, no.

Q. Did anybody on the board advise him?

A. As far as I know, they didn't. I don't know. I can only speak for myself.

(Testimony of Eugene F. Cunningham.)

Q. Now you testified on your direct examination about a discussion in a board meeting about shutting down the plant. What was the date of that meeting?

A. March 28th, I believe.

Q. Is it your testimony that there was discussion of shutting down the plant at that meeting?

A. Well, Patterson was ordered at that meeting to not purchase any additional veneers and to work out the pile that was on hand. I think there was some discussion relative to shutting down the plant. I doubt if at that meeting there was a definite order to shut down the plant, but I think there was some discussion, however, at that time of the possibility that we might have to shut down.

Q. You say you think there was some discussion. Do you know where there was or not?

A. I am sure there was.

Q. Weren't the instructions that were given at that meeting to use up the veneer that was in the plant before buying more veneer?

A. Yes, they were. That was the instructions to Mr. Patterson.

Q. And there weren't any instructions issued to him to shut down at that meeting?

A. I don't believe there was. In fact, I am sure there were not.

Q. Now I think you said on your direct testimony that Mr. Hofheins at that meeting never objected to the shutdown. Actually, the question never was directly presented, was it?

A. Whether it was authorized or not at that time, I can't rely upon my recollection too much,

(Testimony of Eugene F. Cunningham.)

but I think the minutes speak for themselves. If there was an order to shut down the plant at that time it should be in the minutes. [185]

The Court: I don't think that was the testimony, anyway. The question was did Mr. Hofheins object to the direction given to Mr. Patterson not to buy any more veneer until he had used the rest of the veneer. That was the question.

Mr. Anderson: I was under the impression the testimony was whether Mr. Hofheins objected to shutting down. If that was it——

A. I think we all agreed at that time that the company was broke and that something would have to be done and we should work out the stockpile that was on hand. I don't think there was any question about that. There was no disagreement on the subject.

Q. (By Mr. Anderson): Mr. Cunningham, as Chairman of the Board of Directors did you feel an obligation to make this company perform under its sales contract?

A. As, if and when it produced plywood.

Q. How much time did you spend with the company?

A. I can't tell you. I spent a good deal of time there. There were numerous trips down there, and I spent a great deal of time. I should say perhaps I spent as much as three months continuous service for the company over the period of a couple of years.

The Court: What were you paid for your services?

(Testimony of Eugene F. Cunningham.)

A. Nothing. There never was any charge for that. I have never been compensated in any way. I don't expect to be. [186]

Q. (By Mr. Anderson): One further question, Mr. Cunningham. When was it you first learned that Mr. Adams was available as a manager?

A. I believe it was the latter part of May or early June or middle of May, somewhere around there. If my recollection is correct, Mr. Patterson left on May 1st, and it was something like a couple of weeks later that Mr. Adams dropped into my office at Tacoma and talked to me about a job as manager. The exact date I couldn't tell you.

Q. The next meeting, I take it, would have been the creditors' meeting or, rather, the shareholders' meeting on June 12th? A. Yes.

Q. Did you advise the shareholders that Mr. Adams was available as a manager? A. No.

Q. You did not? A. No.

Q. Was any discussion had at that meeting about——

A. Not relative to managers. Not relative to managers.

Q. Was there a directors' meeting held at the same time?

A. It seems to me that there was a day difference between.

Q. But on or about the same time? A. Yes.

Q. At the directors' meeting was there a discussion had about hiring Mr. Adams as a manager?

A. Well, there was mention of it, yes.

Q. What was the reaction?

(Testimony of Eugene F. Cunningham.)

A. The reaction was what use is a manager, when we are in this kind of a fix?

Q. Now Mr. Cunningham, with your veneer purchases financed all you had to do was to arrange for the payroll financing, wasn't it?

A. Yes, but who would we arrange with?

Q. Well, that was the job, wasn't it, to arrange for the payroll financing?

A. Payroll and other items, pay off some of the bills we had and keep the power going. I think there was something like \$1500 required to get the power turned on again at that time. And there were numerous other items, and we had some \$45,000 in creditors.

Q. Didn't you receive offers from Oregon Plywood Sales Corporation for you to submit a plan and that they would cooperate with you in any way they could to get you going? A. No.

Q. Did you read the correspondence that came to Sutherlin? A. Yes, sir.

Q. Didn't you receive a letter in May from Franklin Hofheins asking you to submit a plan and telling you that he would cooperate in any way possible?

A. Yes. Bob and I had several conversations about it and [188] that ended the matter.

Q. There was never any reluctance on the part of Oregon Plywood Sales to arrange for the green veneer financing, was there? A. No, sir.

Mr. Anderson: That is all.

(Testimony of Eugene F. Cunningham.)

Redirect Examination

Q. (By Mr. Yerke): Why didn't you reopen then?

A. Obviously, we had no money to reopen.

Q. Did you attempt to find additional sources of money? A. Yes, sir.

Mr. Yerke: That is all.

Recross Examination

Q. (By Mr. Anderson): Mr. Cunningham, what happened to the market in the summer of 1954?

A. The market was steadily sliding down until the strike occurred, and then I would say that it steadied up for a while and finally commenced to react upward.

Q. When that happened you had opportunities to sell the plant, and rather than put in any more time on it you decided you wanted to get your money out of it that way. Isn't that what happened? When the opportunities arose with the market rising [189] you decided that you wanted to sell the plant?

A. No, no. I would say the stockholders decided that. I didn't decide it.

Q. Who raised that matter at the June meeting suggesting the sale? A. I did. I told——

Q. You were the one who initiated the idea, weren't you?

A. I told the stockholders exactly what the situation was, and that if we didn't sell it or lease it or take some definite action at that time that there

(Testimony of Eugene F. Cunningham.)

would be either a receivership or bankruptcy, in my best opinion, unless the crowd were willing to raise some money so that we could get started again. The matter of some the boys working for awhile for practically no wages was discussed, and the amount of money that was apparently offered at that meeting was so insignificant that there seemed no possibility whatsoever of getting the plant in operation. Many people on the floor discussed the thing and brought their ideas in front of the meeting and nothing happened. The ultimate result of it was that we decided either to sell the thing or lease it at that time, whatever we could do.

Q. What was the extent of your holdings in Sutherlin Plywood?

A. I don't know exactly. It is something in excess of \$175,000.

Q. At the time you made this sale Sutherlin had a very substantial net worth, did it not?

A. Are you referring to bookkeeping or actual values? [190]

Q. I am talking about the net worth as shown on the books, which I assume to be correct.

A. Book value, yes. It had considerable book value.

Q. Between three and four hundred thousand dollars, wasn't it?

A. I imagine so. I don't know the exact figure.

Q. They were not broke, by any means?

A. I considered them so. It is all the point of

(Testimony of Eugene F. Cunningham.)

view, I guess. If they have no cash and are insolvent, are they broke? That is the question.

Q. All they needed to get going was a month's payroll? A. Sir?

Q. All they needed to get going was a month's payroll? A. All they needed was some money.

Mr. Anderson: All right. That is all.

Redirect Examination

Q. (By Mr. Yerke): Have you gotten any return on your stock yet? A. None whatsoever?

Q. When do you expect to get something back on it?

A. I think about 18 months from now, or two years maybe.

Q. Do you know whether or not the capital of Sutherlin Plywood Corporation was impaired at the time of the sale? A. It was.

Mr. Yerke: That is all.

Mr. Anderson: That is all.

(Witness excused.) [191]

JOHN RICHARD ADAMS

was produced as a witness in behalf of the Defendants and, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Mr. Adams, you testified yesterday, didn't you? A. Yes.

Q. Did you apply for a job as manager of the plant at one time?

(Testimony of John Richard Adams.)

A. At the time I heard that Mr. Patterson was no longer going to be with the plant I went down to look it over, and I think there was some discussion as to managing the plant.

Q. You and Mr. Jacobson ultimately submitted an offer for the plant, did you not?

A. That is right.

Q. Did you ever attempt to lease the plant? Did you negotiate on that particular basis?

A. Yes, our first negotiations were on the basis of a lease, a lease for so much a thousand on what we could produce.

Q. Whom were you dealing with as far as these negotiations were concerned?

A. Principally Mr. Cunningham.

Q. Where were the negotiations occurring then?

A. I think in Tacoma.

Q. In connection with your negotiations for a lease did you ever seek legal advice concerning the effect of the sales contract? [192]

A. Yes, I did.

Q. Whom did you consult?

A. The law firm of Carson & Newland in Tacoma, Washington.

Q. Did you obtain a written opinion from them?

A. Yes, I did.

Q. In connection with the actual sale of the assets who represented you and Mr. Jacobson?

A. An attorney in Seattle, Snyder King.

Q. Did you seek advice from Mr. King on the effect of the sales contract on a possible purchaser of the assets?

A. Yes, we did, verbal advice.

(Testimony of John Richard Adams.)

Q. Since Nordie Plywood, Inc., commenced operating the plant have there been many changes as far as equipment is concerned?

A. There have been any number of changes. We have added quite a lot more equipment and increased the capacity of the plant.

Q. Are you in charge of the production of the plant today? A. No.

Q. What is your business down there?

A. I handle the sales and the office.

Q. Is the plant making money at the present time? A. Yes.

Q. Has it lost money at all since it commenced operating? A. Yes, it has.

Mr. Yerke: That is all. [193]

Cross Examination

Q. (By Mr. Anderson): Mr. Adams, how much capital did you put into this business?

A. Our capital was \$50,000.

Q. That was the total amount, was it not?

A. No.

Q. Between you and Mr. Jacobson?

A. That was our total investment, although we had help otherwise.

Q. Do you have an arrangement where anybody purchases your green veneer for you? A. No.

Q. That \$50,000 would not buy a half a month's supply of green veneer, would it?

A. Well, I wouldn't say that.

Q. All right. It wouldn't buy a month's supply, would it?

(Testimony of John Richard Adams.)

A. We don't buy a month's supply all at once.

Q. Would it buy a month's supply?

A. Well, you just don't buy a month's supply. You buy by weeks.

Q. Just answer the question whether it would or would not buy a month's supply.

A. No, it would not.

Q. Do you have a sales contract?

A. We have a sales contract on part of our production, yes.

Q. What is the discount—I withdraw that. That has nothing [194] to do with it.

The Court: It doesn't make any difference to me. Did you get finances from any other source?

A. Yes, we did.

Q. (Mr. Anderson): You financed through the bank, didn't you? You are now financing through the bank, are you not?

A. We finance our accounts receivable through the bank, yes.

Q. Now these equipment changes that you are talking about, the really major equipment change was the addition of a new drier last spring or last summer, was it not, an additional drier?

A. The additional drier, press, glue machine, jitneys and buildings.

Q. Isn't it correct that when you started up you started up with what was in the plant?

A. That is right .

Q. Isn't it correct that within the first three months you showed a profit of over \$20,000?

(Testimony of John Richard Adams.)

A. Well, I don't remember the exact figures.

Q. Whatever is shown on the balance sheet?

A. That is right.

Q. Whatever is shown on the balance sheet of your company is the profit you show?

A. That is right.

Q. You recall that you got into the black within the third month, do you not? [195]

A. Yes, we were in the black after the third month.

Q. You made the payments on the mortgage of \$5500 every month?

A. That is right.

Q. You have been charging depreciation at what rate?

A. Well, it is whatever the accountants have set up. I don't know the exact rate.

Q. Whatever is shown in the accounting records?

A. Yes.

Q. So you have not only made a profit but have been able to pay \$5500 a month on the loan and you have made substantial charges for depreciation?

A. The figures will show what we have done.

Q. What are your prospects now on a five-year basis?

A. I couldn't tell you.

Mr. Anderson: That is all.

Redirect Examination

Q. (By Mr. Yerke): You lost money the first few months that you operated, didn't you?

A. I think the first month we operated we lost money.

(Testimony of John Richard Adams.)

The Court: The books would show.

Mr. Yerke: That is right, your Honor. No further questions.

The Court: I don't think it makes any difference, anyway.

(Witness excused.) [196]

NORMAN H. JACOBSON

was produced as a witness in behalf of the Defendants, and, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): You testified yesterday, did you not, Mr. Jacobson? A. Yes, I did.

Q. How long have you been in the plywood business? A. About 35 years.

Q. What was your last position with a plywood organization prior to the time that you commenced working down at Nordic Plywood?

A. I was with the Astoria Plywood at Astoria.

Q. For how many years?

A. About three years and a half, I think.

Q. In what position? A. I was the manager.

Q. Have you ever been a superintendent in a plywood plant? A. For some twenty years, yes.

Q. When did you first see the mill down at Sutherlin? A. The week after July 4th.

Q. Of 1954? A. That is right.

Q. Did you inspect the mill at that time?

A. I did, yes. [197]

Q. Did you talk to anyone down there?

A. Only the watchman.

(Testimony of Norman H. Jacobson.)

Q. What did you see as far as the machinery was concerned?

A. Well, naturally that was the first thing I looked at. I know that some of the machinery—some of the fork lift trucks were old, and the tapping machine, which is a very vital machine for the mill, was not a very good type.

Q. Why not?

A. Because it was originally made for hardwood, which is a thin wood, and wouldn't do so well on fir wood, as proven out later.

Q. Fir, of course, is a soft wood, is it not?

A. That is right.

Q. What was the condition of the press?

A. The press was of German make, and the wiring which we had to replace later caused us a great deal of trouble and loss of money. We re-wired the press as soon as we found out what had to be done, and since then we have had no trouble with it.

Q. How many openings did the press have?

A. Fifteen.

Q. What is an opening, incidentally? What is the function?

A. That is where they place the panels. If there are 15 openings then you are making 15 panels. You have one panel between each opening. That is the extent of your production in the press. [198]

Q. Is that a desirable number of openings?

A. No, most plants have about 20 openings.

Q. Would that be a disadvantage?

(Testimony of Norman H. Jacobson.)

A. Yes, it would as far as production is concerned.

Q. Why is that?

A. Because you would be limited as to how many panels you could make in a given period of time.

Q. How much per day, if you know?

A. It would run around 900 panels a day, and figuring on 4 by 8 panels, that would be 32 foot to a panel, so you would multiply that by nine and you would have it,—practically a carload of plywood during 24 hours.

Q. Now did you encounter any difficulties with this equipment after you started operating with it?

A. Yes, we did. What we thought when we looked the mill over was borne out later when all this equipment was replaced. The lift trucks, which are very important to a mill, were replaced. We bought four new lift trucks—five new lift trucks. We replaced the taping machine. We also rewired the press, and we had to replace all the bearings in the drier which had disintegrated, and we rearranged quite a bit of the machinery to make it more efficient.

Q. You say you replaced the taping machine. What is the taping machine used for?

A. It is used for narrow strips to make a wide piece of veneer. [199]

Q. Now you mentioned that the bearings in the drier had to be replaced. Why was that?

A. Because they were a new type bearing and

(Testimony of Norman H. Jacobson.)

they wouldn't stand up under the heat that was in the driver.

Q. What would happen to the bearings?

A. They would disintegrate and the rollers would drop down and the rollers would plug up.

Q. Now have you made any changes down there other than the ones that you referred to as far as the operation was concerned?

A. Yes. If you consider buildings, we have made or provided more floor space. We have added a shop, which they didn't have, and we have rearranged — like I said before, we rearranged a lot of machines, and added a drier and a press and the glue machine. And we have added a tenoner for tongue and groove plywood.

Q. What is a tenoner?

A. It is a machine that is used for tongue and grooving shiplap or plywood.

Q. Did you say that you had added a new drier and a new press? A. That is right.

Q. Have you rearranged any of the machinery?

A. We have, yes, lots of it.

The Court: All right. Go to another subject.

Mr. Yerke: Just one other question, I think, your Honor.

Q. When was the new machinery put in; that is, the new drier [200] and the new press?

A. During the month of August, 1955.

Q. 1955? A. That is right.

Mr. Yerke: That is all.

(Testimony of Norman H. Jacobson.)

Cross Examination

Q. (By Mr. Anderson): Mr. Jacobson, all these changes that you have made, you have done that with the money that came in through the business?

A. No, I won't say that. A lot of the machinery has been bought on contract.

Q. All right. But you haven't put in any more capital other than the original fifty thousand?

A. Yes, we have. We put in some more capital.

Q. That was in small amounts?

A. We borrowed money ourselves and put it into it occasionally.

Q. Very small amounts?

A. Well, it wasn't so small. It had to be repaid. I think it was \$40,000.

Q. They were temporary loans, were they not? It wasn't that much at one time?

A. Yes. I think it was given to us in lots of \$10,000 as the work progressed on the mill.

Q. Those were loans from the bank; is that right? [201]

A. That is right, our own personal loans.

Q. You endorsed them on the corporation's note?

A. Yes, that is right. We make the payments ourselves.

Q. Now as a matter of fact, up until the time you put in the drier these repairs didn't amount to an awful lot in dollars, did they?

A. What kind of repairs?

Q. For instance the taping machine. Did you replace the taping machine?

A. Yes, we did.

(Testimony of Norman H. Jacobson.)

Q. What did that cost? A. \$3,000.

Q. How much? A. \$3,000.

Q. You bought that on contract, didn't you?

A. We did, yes.

Q. Do you remember the down payment?

A. 25 per cent.

Q. So that the things were small. As a matter of fact, you got the bearings furnished by the manufacturer, didn't you, for the drier?

A. That is true, but there was a labor item in there that was quite large in loss of time.

Q. It was done by your regular crew, wasn't it?

A. And the jitneys also cost us close to \$10,000.

Q. All that was paid for out of the operation?

A. Well, it is being paid for out of our operation.

Mr. Anderson: All right. That is all.

Redirect Examination

Q. (By Mr. Yerke): You say you had a large labor item to replace these bearings furnished by the manufacturer? A. Yes, sir.

Q. What do you mean by that?

A. There is about a thousand bearings in a drier, and they had to be replaced manually. It takes a lot of time and work to do that. They had to be replaced on a week end, which is time and a half.

Q. Does the drier ordinarily operate on a seven-day week? A. It does.

Mr. Yerke: That is all.

(Witness excused.) [203]

RAYMOND M. WARD

was produced as a witness in behalf of the Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McClanahan): What is your occupation? A. I am a certified public accountant.

Q. Are you licensed to practice in Oregon?

A. I am.

Q. How long have you been licensed in Oregon?

A. Since 1921.

Q. What is your experience in accounting?

The Court: Oh, if he is a certified accountant why is it necessary to qualify him?

Q. (By Mr. McClanahan): Did you ever practice in Roseburg? A. I did.

Q. Did you have any contacts with the defendant Sutherlin Plywood Corporation in your practice? A. I did.

Q. Over what period of time did you have contacts with Sutherlin?

A. Sutherlin Plywood Corporation contacted the firm with which I was employed the first part of December, 1953.

Q. Did you do any work for them?

A. We audited the records and prepared financial statements as a result of that audit as of December 31, 1952. [204]

Q. What else did you do besides auditing the records?

A. We issued another report as of December 31, 1953, because of the year end, and as of the first

(Testimony of Raymond M. Ward.)

of the year 1954 they commenced operations and they required a system to reflect the results of the operations, and I set up an accounting system and records and supervised the recording of transactions for the first month and followed through with the preparation of financial statements.

Mr. McClanahan: Would you hand the witness Exhibit 143, please.

Q. Now the biggest bunch of yellow papers there, what is that?

A. 143-C. They are working papers prepared by me in connection with the review of the records.

Q. From where did you get the information that is contained in these?

A. I obtained this information directly from the sales invoices to Oregon Plywood Sales Corporation and copies of the sales invoices from veneer purchase invoices and from duplicate deposit slips.

Mr. Anderson: May I inquire if this is for the purpose of qualifying the financial statement? If it is——

Mr. Yerke: No, it is not. It is merely to tie up, Mr. Anderson, for the purpose of the record just what these are. They are in evidence already, but I just wanted to get something in the record to indicate what they are. [205]

Mr. Anderson: For what purpose?

Mr. Yerke: That is in connection with the counterclaim.

Mr. Anderson: As I understand it, there is no

(Testimony of Raymond M. Ward.)

dispute about the credits for the veneer purchases which he is testifying about now.

The Court: What is the counterclaim? I don't know what the counterclaim is.

Mr. Anderson: That is just an open account. We call it the open account claim. They call it a counterclaim. There are various debits and credits between the parties.

The Court: Is it a matter of judgment at all, or is it just a matter of items of bookkeeping entries?

Mr. McClanahan: It is to some extent a matter of dispute as to the items, such as the assignment and other items. We can come to an agreement on most of the other things.

The Court: Isn't all the evidence in on the assignment?

Mr. Yerke: Yes, your Honor.

The Court: I hold against you on the assignment, so you can start with that.

Mr. Yerke: This testimony here has relevance to other matters, your Honor. It has relevance to connecting these documents which are in evidence to reflect the financial condition and the relations which Sutherlin had to plaintiff.

Mr. Anderson: He is testifying about the green veneer purchases, as I understand. [206]

Mr. Yerke: He is not testifying about green veneer purchases. He is testifying about Exhibit 143. There are three documents in there and we want to connect them with each other.

(Testimony of Raymond M. Ward.)

Mr. Anderson: With regard to which item?

Mr. Yerke: In regard to the financial condition of Sutherlin and its relations with the plaintiff, which we submit, your Honor, is relevant in this lawsuit.

The Court: For what purpose?

Mr. Yerke: These documents, your Honor, will show, for instance, for one thing, whether the 80 per cent advance was made and when it was made by invoices which show that. Furthermore, it will show the treatment on the books of the various items testified about.

The Court: What is your counterclaim?

Mr. Yerke: Our counterclaim, your Honor, is for additional credit which we have not been given on the veneer purchases and for the balance due us for plywood sold to the plaintiff.

The Court: How much is your counterclaim?

Mr. Yerke: We wanted to amend the pretrial order on that, your Honor. The figure is \$4,515.03.

Mr. Anderson: We have no objection to the amendment.

The Court: All right. Now that I have decided against you on the assignment, what is your counterclaim?

Mr. McClanahan: If you reduce our claim on the counterclaim—if you find against us on the assignment we have no [207] counterclaim.

The Court: All right.

Mr. Yerke: It is then, of course, a matter of just what you determine we owe the plaintiff to the extent that the items have been proved.

(Testimony of Raymond M. Ward.)

The Court: All right. Now on the question of the financial condition of the company you don't need to ask him any questions. I know what the financial condition was. The books and records show that.

Mr. McClanahan: No further questions.

The Court: Do you have a financial statement as of March or April?

A. I have one of January 31st, February 28th, March 31st, April 30th and May 31st also.

The Court: May 31st? A. Right.

The Court: What number is that?

Mr. Yerke: That is Exhibit 131, your Honor.

The Court: Let's take a look at that.

Q. (By Mr. McClanahan): 131-G. Does this report, Exhibit 131-G, accurately reflect the condition of the business as taken from the books and records of the company? A. It does.

The Court: Was it done in accordance with good accounting practice? [208] A. It was.

The Court: All right.

Mr. Yerke: That is all, your Honor.

Cross Examination

Q. (By Mr. Anderson): I have just one question, Mr. Ward. Were you charging depreciation in these accounts?

A. Which account are you referring to? You are referring to Sutherlin Plywood?

Q. Yes, Sutherlin.

A. Yes, we set up those depreciation schedules.

Q. What method of depreciation did you use?

(Testimony of Raymond M. Ward.)

A. Straight line.

Q. What period of time?

A. Well, it varies. As I recall—I am not too sure of this and I would have to refer to my working papers—as I recall we probably set up 12 years on the buildings and probably 10 years on the machinery and equipment and probably five years on the lift trucks.

Mr. Anderson: That is all.

Mr. McClanahan: No further questions.

The Court: Let me ask one other question. Can you tell from this Exhibit 131-G whether the company was in a position to pay its ordinary current liabilities in the ordinary course of business?

A. Well, this statement shows cash of \$409.00, and it shows the current liabilities over here of \$124,136.10. It shows a small amount of inventories which could be liquidated into cash. How much cash I can't tell by looking at this. It shows some stock subscriptions receivable which have been cancelled. They didn't receive any cash for those. And it shows accounts receivable broker and accounts receivable other in amounts of \$5,570.79 of accounts receivable broker and \$8,147.54 accounts receivable others. However, I am of the opinion that those were not all fully collected.

The Court: All right.

Further Cross Examination

Q. (By Mr. Anderson): Mr. Ward, you also have in here as current installments 12 months installments on the contracts and on the notes, do you

(Testimony of Raymond M. Ward.)

not? A. Yes, that is correct.

Q. But all those were not due at the time this was prepared? What we call current is something coming due within 12 months?

A. Those are all due within 12 months.

Mr. Anderson: All right.

Redirect Examination

Q. (By Mr. Yerke): Most of those were due at that time, weren't they, because [210] of defaults?

A. Some of these were delinquent. They had missed two or three months' payments.

Recross Examination

Q. (By Mr. Anderson): Just a minute, Mr. Ward. You say most of those were due?

A. Most of them couldn't have been due because this was only May 31st.

Q. As to some of them—for instance, the corporation note, which is \$1,000 a month, you have \$12,000. It indicates that only \$1,000 was due?

A. Yes.

Mr. Anderson: That is all.

(Witness excused.)

Mr. Yerke: We will reoffer at this time, your Honor, Defendants' Exhibit 128-A.

The Court: What is it?

Mr. Yerke: That is a letter from Mr. Hamby, who testified this morning, to Oregon Plywood Sales Corporation, I believe dated April 14th, 1954. I believe you have examined this, Mr. Anderson.

Mr. Anderson: Mr. Yerke, we have dropped the claim to which this letter relates, about the 5 per cent that was given [211] to somebody else. The \$1260 item has been deleted

Mr. Yerke: All right. You are dropping the claim. We withdraw the offer in that event.

Mr. Anderson: We dropped that \$1260 item, yes.

Mr. Yerke: We also offer at this time, your Honor, Exhibits 129-A through 129-F. Those are the letters from Mr. F. A. Hofheins and Mr. Robert H. Hofheins.

The Court: What do they refer to?

Mr. Yerke: They refer to a variety of matters. Mr. Anderson has examined these.

Mr. Anderson: I have no objection. I think they are already in as plaintiff's exhibits.

The Court: They may be admitted.

(The correspondence above referred to was received in evidence as Defendants' Exhibit 129-A to 129-F, inclusive.)

Mr. Yerke: We also offered this morning and Mr. Anderson objected to Defendants' Exhibit 136. I don't believe there was any ruling on that. That is a letter, your Honor, from Attorney Newlands to Mr. Adams concerning the legal effects of the contract upon a lease of the plant.

The Court: Any objection?

Mr. Anderson: The objection, your Honor, was raised. I don't see any materiality to it.

Mr. Yerke: Once again, we offer it only from the standpoint [212] of the good faith of defendant

Nordic Plywood Company in the dealings it had with the other defendant.

The Court: All right. I will admit it for that limited purpose.

Mr. Yerke: Thank you, your Honor.

(The letter above referred to was received in evidence as Defendants' Exhibit 136.)

Mr. Yerke: Then we also offer Exhibit No. 137, which is a letter from a firm of attorneys to defendant Sutherlin Plywood Corporation concerning one of the conditional sales contracts.

The Court: That is all right. It may be received.

(The letter referred to was received in evidence as Defendants' Exhibit 137.)

Mr. Yerke: I am not sure, but we will reoffer just for the purpose of the record Exhibits 131 and 132.

The Clerk: They are already received.

Mr. Yerke: The defendants rest, your Honor.

The Court: Go ahead.

Mr. Anderson: If the Court please, there still remains the item of \$1526 in dispute.

The Court: About what?

Mr. Anderson: That concerns orders which were accepted and acknowledged by Sutherlin, and the plaintiff was committed to its customer. The plaintiff had to place those orders elsewhere and was unable to do so at the 5 per cent discount. It [213] had to pay out the money and it did so and lost that money.

Mr. Yerke: We have stated our position on

that, your Honor. They are suing on a supposed open account and it is an unliquidated claim.

Mr. Anderson: We are prepared to put on testimony on that at this time, your Honor. There are five orders involved, and Mr. Thompson is fully familiar with that, I think.

The Court: Under the form of pleading we use here is there any reason why a tort claim cannot be joined with a contract action?

Mr. Anderson: None that I know of.

Mr. Yerke: No, there is no reason, your Honor. It is just a matter of the theory that is embraced in their contentions. They allege there is due them upon an open account a certain sum.

Mr. Anderson: If there is anything wrong with the contention I would like to move the Court to amend. We have been litigating this point all through the trial. I would like to move to amend to include these items which are included in our summary.

The Court: What about that?

Mr. Yerke: Oh, we won't oppose any amendment.

The Court: You can amend. I was going to let you do it, anyway. [214]

HENRY L. THOMPSON

was recalled as a witness in behalf of the Plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Thompson, I am showing you part of Exhibit 10 and I will ask you if

(Testimony of Henry L. Thompson.)

you wrote a letter dated April 20th to Sutherlin Plywood. A. I did, sir.

The Court: Mr. Yerke, have you seen all this correspondence?

Mr. Yerke: I don't think I have seen all of it, no. May I come up too?

The Court: Yes, come up and take a look at it. Is there any question about the fact that these orders had been received and that they were filled by the company?

Mr. Yerke: I don't think we can take issue with the facts that he would testify to.

The Court: All right. What is your final result?

Mr. Anderson: Well, the result is included in the letter.

Mr. Yerke: Why don't you just tell the Court the conclusion that Mr. Thompson would testify to, and we will stipulate that if he is called he would so testify.

Mr. Anderson: What he would testify to, your Honor, is that there are these five orders which were placed or had to be placed elsewhere at greater expense because they were [215] obligated to the customer, and the total is \$1226.

The Court: All right.

Mr. Anderson: It is set forth in his letter.

The Court: Your letter is admitted and the testimony is admitted. That is, it is stipulated that Mr. Thompson would so testify.

Mr. Yerke: That he would so testify. That is right.

(Testimony of Henry L. Thompson.)

The Court: Let me ask one question. When were these orders placed?

A. Some of them in March, the early part of March and the middle of March, I believe.

The Court: The early part and middle of March. And the plant closed April 21st?

Mr. Yerke: That is right, your Honor.

The Court: Were they for the regular type of material? A. Just regular type orders.

The Court: Quarter inch?

A. Oh, various sizes.

The Court: Standard sizes? A. Yes, sir.

The Court: All right.

Q. (By Mr. Anderson): At any rate, they were accepted?

A. They were acknowledged in March.

(Witness excused.) [216]

The Court: Any further testimony?

Mr. Anderson: The plaintiff has no further testimony.

May I inquire one more thing? I believe in walking up to court Mr. McClanahan and I decided that on this open account claim we have only three items now in dispute, the \$1526 item, the \$336 item and the assignment. The assignment has been ruled upon. That leaves only two.

Mr. McClanahan: I misspoke myself, Mr. Anderson. There is an additional item for one per cent on the discount on the veneer purchases which we have not received credit for. There is a difference between us on that of \$1123.33. We contend that

it is normal in the plywood industry to give a one per cent discount on all veneer purchased. In this case that was the situation except for the Lake Pleasant invoices, on which we are entitled to 2 per cent and which we received. This \$1123.33 is for additional discount on the veneer, on the invoice price of the veneer, which we did not receive.

The Court: Did Oregon Plywood Sales receive them?

Mr. McClanahan: I understand that they contend they did not. We contend that under the contract they were duty bound to take them, and not to charge us for them if they didn't.

The Court: You mean even if they didn't get the discount they were to give you the discount?

Mr. McClanahan: That is correct, your Honor. We believe that is manifested in the loan agreement provision for the [217] veneer. After all, your Honor, this was a promise to advance money so we could buy veneer.

Mr. Anderson: I want to ask Mr. Hofheins a question, if I may ask him here.

The Court: Yes.

ROBERT HOFHEINS

was recalled as a witness in behalf of the Plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

Q. (By Mr. Anderson): Did you credit Sutherland with all the discounts that you received on the

(Testimony of Robert Hofheins.)

green veneer purchased, and does that come up with a net figure of \$214,346.83?

Mr. Yerke: Objected to on the grounds no proper foundation has been laid.

The Court: Objection overruled.

A. Yes, sir.

Mr. Anderson: That is all.

(Witness excused.)

The Court: Mr. Anderson, did you see the cases that Mr. Yerke cited in his brief? Did you read them?

Mr. Anderson: Which brief are you speaking of, your Honor?

The Court: That is the defendants' memorandum on Sutherlin [218] Plywood Corporation's right to terminate production and sell its mill.

Mr. Anderson: Yes, I think I have read most of those cases, your Honor, the ones which are in conflict with the cases we presented.

The Court: Mr. Anderson, I don't think there is any use for me to study this. I am ready to decide this case.

Mr. Anderson: If there is any doubt in your Honor's mind——

The Court: There is no doubt how I am going to decide it.

Mr. Anderson. ——I would like to present a brief on the legal points involved. I think there is adequate authority in Oregon and in the Ninth Circuit——

The Court: Mr. Anderson, you have been forget-

ting all the time about Mr. Hofheins' obligation. He was a member of the Board of Directors of this corporation. He wasn't just a man who was sitting by. It seems to me that when things were going bad he had some duties to perform, and he just couldn't sit idly by when his company was secured and he didn't have a chance of losing any money and complain about the fact that all these working people in addition to—I have forgotten this man's name who was president of the company who had all this money in the corporation. You couldn't expect him to do all the work. It seems to me the evidence is very clear in this case that the defendant Sutherlin Plywood Corporation had the alternative of selling its plant or going broke. I [219] don't think that it had any opportunity of complying with this contract. The time for compliance had long since passed when they closed up shop.

I am going to construe the contract that was entered into, this output contract and this requirements contract, as indicating that they would ship 80 per cent of their production during all the time that they were in production, but that if conditions made it unprofitable or if for other reasons they couldn't produce then they were relieved of that obligation. I think the evidence is clear, too, that it was just folly for them to try to continue in view of the financial condition with which they were faced.

Mr. Anderson: Is your Honor holding that financial difficulties are an excuse for performance?

The Court: Yes, I am holding precisely that;

that this company could not have performed and had no opportunity to perform. And I hold here that all of the directors acted in good faith, and that the condition with which they were confronted excused further performance by Sutherlin Plywood Corporation. And, as I have indicated before, I think there is absolutely no merit to the contention that the Nordic Plywood would be bound by this contract. Here is a situation in which none of the former directors and stockholders of Sutherlin Plywood Corporation were in the new company. There was no collusion between these two organizations, nor do I [220] think that they acted in bad faith. And I say that even without regard to the legal opinions which they received to that effect, and in which I place no credence.

I have already stated here that I think the assignment was not in payment; it was merely a security transaction; and that Oregon Plywood Sales is entitled to that amount. I also am of the opinion that Oregon Plywood was not required to give them greater discounts on the green veneer than they actually received. Mr. Hofheins testified that he gave them all the discounts that he got, and he did not get this one per cent, so I am not going to give it to the defendants.

Now with reference to the \$333, I think that the evidence is undisputed that the plaintiff actually put that money out and gave credit for that amount, and I am going to allow that.

The only one that I have any doubt about is the question of the liability for orders which were ac-

cepted and not filled. Mr. Yerke, were there other orders which were not filled, or why weren't these orders filled?

Mr. Yerke: We are not certain, for one thing, your Honor, about the orders in question. The second thing is we don't know, to be perfectly frank.

The Court: You see, the thing is that these are not orders which were placed just prior to the time the plant closed. Mr. Thompson testified that many of these orders were [221] placed during the early part of March. The plant did not close until the 31st.

As to orders which were placed and accepted I am going to hold that the plaintiff is entitled to recover for the damages it sustained. That is fifteen hundred——

Mr. Yerke: \$1526.

The Court: All right. The plaintiff can have that.

I am not going to allow costs to either party because of the failure of the plaintiff to substantiate its primary claim. Each party will bear its own costs.

Is there any other item here?

Mr. Yerke: Do you wish us to prepare the findings, your Honor?

The Court: You can prepare the findings, and you prepare your findings on your side of the case if you wish, Mr. Anderson. If you want to prepare the findings on the counterclaims, that is all right.

Mr. Anderson: The Court has indicated its feeling on this and I hesitate to delay the matter, but

I do feel that there are two points of law upon which I would like to present authorities.

The Court: All right. You present them. But I will decide the way I have.

Mr. Anderson: Yes, sir.

The Court: You take that up with the Court of Appeals. [222]

Mr. Anderson: Yes, sir.

The Court: I have looked over these things. I just think there is no basis and no merit to your principal claim. I don't see any useful purpose in your presenting me with a brief, but you can do it if you want to.

Mr. Anderson: I have authorities to present as to whether financial difficulties are an excuse for non-performance of contractual obligations.

The Court: That is one of your grounds for appeal.

Mr. Anderson: Yes, sir. Of course, the other one is, which the Court did not say anything about, that even if they were not required to produce they still had no right to entirely disable themselves from performing this contract. That is our other point.

The Court: I am going to hold that at the time they closed up they had become disabled through no fault of their own and that the plaintiff, when it entered into the contract with the defendant, knew that the defendant was a weak organization that had very little financing, and that the plaintiff, being an experienced operator, was well aware of the hazardous character of the plywood market

and lumber companies, particularly organizations which were financed primarily by the employees, and knew or should have known of the difficulties of getting good management to conduct these organizations, and that it was certainly within the contemplation of the [223] plaintiff that this company might not be able to withstand the rigors of competition in view of all the circumstances with which a company of this kind might be faced.

Mr. Anderson: What we didn't think of, your Honor, was that they would sell the plant and take the profits for themselves and leave us holding the bag.

The Court: I think that the evidence here shows that the only people that came out whole were your clients; that the other people are the only ones who suffered a loss.

(Whereupon proceedings in the above matter on said day were concluded.)

[Endorsed]: Filed Sept. 7, 1956. [224]

[Endorsed]: No. 15271. United States Court of Appeals for the Ninth Circuit. Oregon Plywood Sales Corporation, Appellant, vs. Sutherlin Plywood Corporation and Nordic Plywood, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: September 1, 1956.

Docketed: September 12, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15271

OREGON PLYWOOD SALES CORPORATION,
a corporation, Appellant,
vs.

SUTHERLIN PLYWOOD CORPORATION, a
corporation, and NORDIC PLYWOOD INC.,
a corporation, Appellees.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in not finding that defendant Sutherlin Plywood Corporation breached its

contract with plaintiff and in failing to award damages for said breach of contract.

2. The court erred in not finding that defendant Nordic Plywood, Inc. interfered with and induced a breach of said contract between plaintiff and defendant Sutherlin Plywood Corporation and in not finding plaintiff entitled to damages and punitive damages therefor.

3. The court erred in not finding that defendants should be enjoined from operation of said mill until and unless they comply with the sales agreement with plaintiff.

4. The court erred in entering findings and conclusions:

(a) Concerning plaintiff's knowledge of defendant Sutherlin Plywood Corporation's ability to perform its contract with plaintiff.

(b) Concerning defendant Sutherlin Plywood Corporation's financial condition.

(c) That defendant Sutherlin Plywood Corporation was disabled from performance of the contract prior to the sale of its mill to defendant Nordic Plywood, Inc.

(d) That defendant Sutherlin Plywood Corporation acted in good faith in selling its mill which disabled it from further performance of its contract.

(e) That defendant Nordic Plywood, Inc., did

not induce defendant Sutherlin Plywood Corporation to sell its mill.

(f) That there was no collusion, conspiracy or agreement between defendant Nordic Plywood, Inc. and defendant Sutherlin Plywood Corporation to destroy plaintiff's rights in its sales contract.

(g) That defendant Sutherlin Plywood Corporation was relieved from honoring its contract with plaintiff if conditions made it unprofitable to continue performance.

(h) That defendant Sutherlin Plywood Corporation was excused from performance of its contract with plaintiff by reason of its financial losses.

(i) That defendant Nordic Plywood, Inc., was privileged to purchase the physical assets of defendant Sutherlin Plywood Corporation.

5. That the findings do not support the judgment.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF

/s/ HERBERT H. ANDERSON

Attorneys for Appellant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 21, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is stipulated by and between the parties hereto, acting through their attorneys, that the exhibits herein may be omitted from the printed record but shall be considered by the court in their original form as though set out in the printed record and appellant and appellees consent to the entry of an order so providing.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF

/s/ HERBERT H. ANDERSON

Attorneys for Appellant

/s/ FREDRIC A. YERKE, JR.

Attorney for Appellees

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 22, 1956. Paul P.
O'Brien, Clerk.